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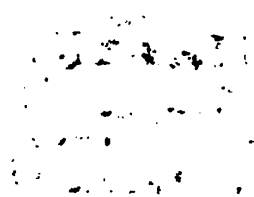
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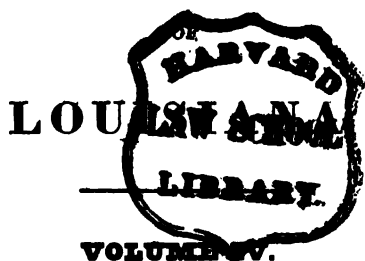
OF

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT



FOR THE YEAR

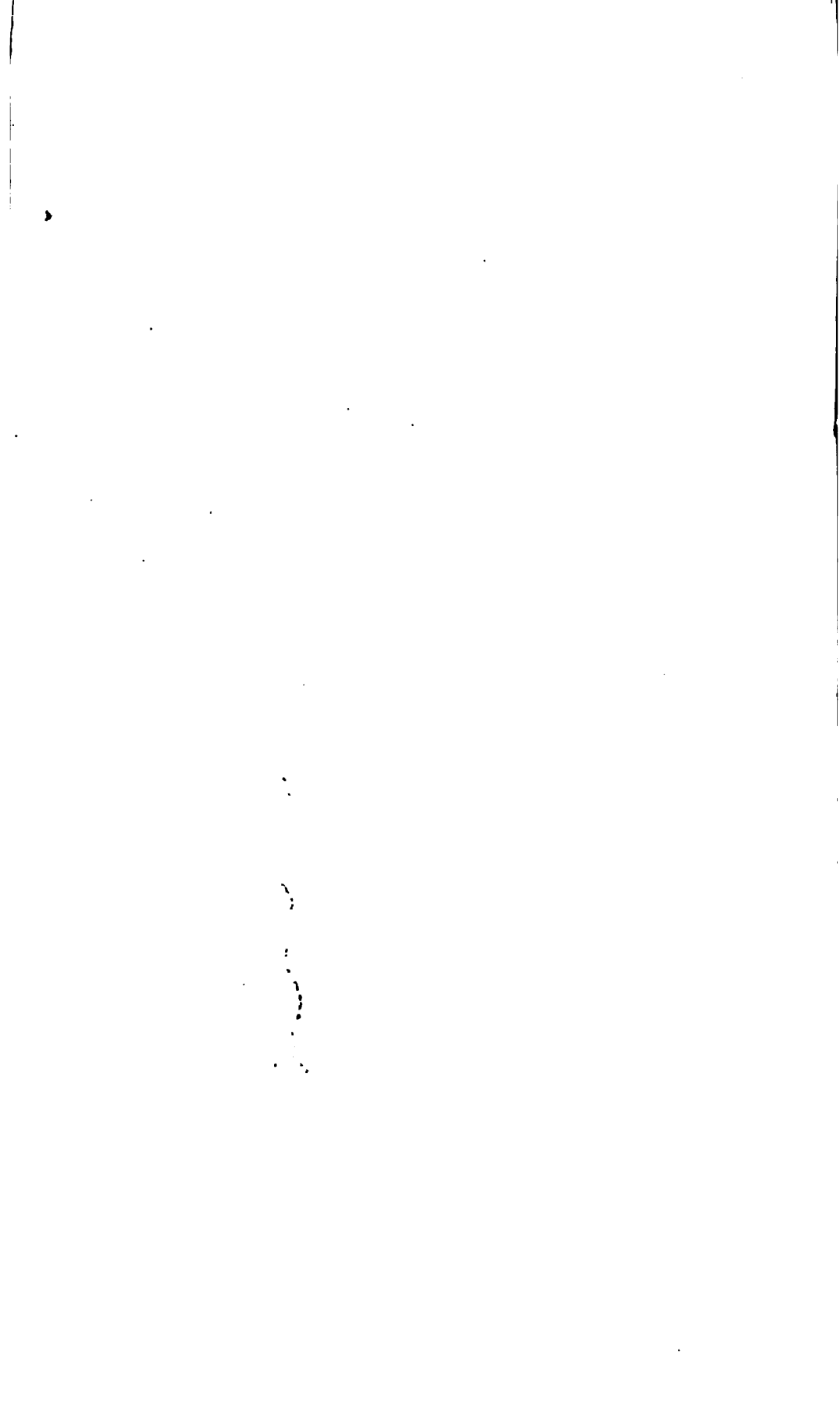
1849.

BY MERRITT M. ROBINSON,
ATTORNEY AND COUNSELLOR AT LAW, AND
REPORTER OF THE COURT.

NEW ORLEANS:

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1850.



JUDGES
OF THE
SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPHE ROST,
HON. GEORGE ROGERS KING, } *Associate Justices.*
HON. THOMAS SLIDELL,

ATTORNEY GENERAL,
WILLIAM AUGUSTUS ELMORE, Esq.

NOTE.—This volume of the Reports was principally prepared by M. M. ROBINSON, Esq., late Reporter. My own labours have consisted in correcting the proofs of the last number, and in making the index and tables of cases. There will be found some changes in the divisions or headings of the index, the object of which was to bring back the more familiar divisions used in Benjamin & Slidell's Digest.

There is also a change which was unintentional. The principles stated in the index are frequently not immediately followed by a reference. In such instances to find the case it will be necessary to look to the first case below, instead of referring back as in the style usually adopted by reporters. This could not be corrected without considerably delaying the appearance of the volume, and it was not deemed of sufficient importance to justify that delay.

WM. W. KING,

New Orleans, August 9th, 1850.

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CASES
 ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF LOUISIANA,
 AT
NEW ORLEANS,
 FROM THE
1st JANUARY to 12th JUNE, 1849.

PRESENT:

Hon. GEORGE EUSTIS, *Chief Justice.*

Hon. PIERRE ADOLPHE ROST,
 Hon. GEORGE ROGERS KING, } *Associate Justices.*
 Hon. THOMAS SLIDELL,

CITY OF LAFAYETTE v. MALE ORPHAN ASYLUM.

A statute exempting the property of an institution "from all taxation, either by the State parish, or city," will not exempt it from liability to contribute to the expense of paving side walks in front of property belonging to it, ordered to be paved by an ordinance of a city corporation, made in the legal exercise of its authority. The charge imposed by the ordinance is not a tax.

A statute exempting an institution from liability to taxation, being in derogation of common right, must be construed strictly. It cannot be extended beyond its clear import.

APPEAL from the District Court of Jefferson, *Clarke, J.* *P. B. Conrad* and *Michel*, for the plaintiffs. *G. B. Duncan*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. By an act of the legislature, of 12 March, 1836, it was declared that, from and after its passage, all the property, real and personal, belonging to the asylum should be exempt from all taxation, either by the State, parish, or city in which it is situated.

The municipal corporation of Lafayette, in the legal exercise of its authority, passed an ordinance in 1844, requiring the owners of town lots, under certain circumstances, to cause the side walks fronting their lots to be paved with brick or flag-stones within a certain time; and, in case of default by the owners, that the work should be done by the corporation, and the owners should be liable for two-thirds of the cost of such work in front of their property. It was also ordained that owners of lots who chose to have the work done by

LAFAYETTE v. ORPHAN ASYLUM. themselves, would be reimbursed one-third of the cost by the corporation. The municipal authority of Lafayette had the side walks fronting the lots of the asylum paved by a contractor employed by it; and instituted this suit, for the benefit of the contractor, against the defendants, for two-thirds of the cost of the work. That the work has been done, and that the price is reasonable, is conceded by the defendants. It is proved that the paving has given an enhanced value to the property equivalent to, and even greater than, the amount sued for. The defendants rest their defence upon the assumption that the charge imposed by the ordinance is a tax; and is illegal, because, by the statute, the asylum is exempt from taxation.

It may be assumed as a rule of common right that no one should be exempted from taxes who possesses property, and is protected by the State in the enjoyment of that property. Absolute freedom from taxes in any individual so situated is, in the absence of some countervailing motive of public policy, an injustice towards the rest of community, who are burdened with them. Hence, therefore, it follows that, in case of legislative exemption from taxation, as in any other legislation in derogation of common right, the statute must be strictly construed. It must not be extended beyond its express words or clear import. See *Coolidge v. Williams*, 4 Mass. 144. *Gibson v. Jenny*, 15 Mass. 206. *Sprague v. Bidsall*, 2 Cowen, 420. "Si la disposition est contraire au droit commun, elle ne doit recevoir d'extension ni d'un cas à un autre, ni d'une personne à une autre, ni d'une chose à un autre." Merlin, *Rep. verbo* Interp.

A number of individuals thought proper to associate themselves for a most praiseworthy object, and obtained a charter of incorporation from the State. The object of the association tended to advance the public welfare, by rescuing an unprotected class of human beings from destitution and vice, and preparing them to be worthy members of society. In consideration of its expected usefulness the legislature thought proper, in derogation of the general law, to exempt it from the burden of taxation. The plaintiffs concede the power of the legislature to grant this immunity; but in our opinion reasonably argue that, the immunity must be restricted to taxes in the usual and proper sense of that term; and that the liberality which they now desire to enforce does not fall within the terms or fair import of the statutory exemption.

Taxes have been by some defined to be that portion of the property of individuals which each has to contribute to the public treasury to defray the public expenses. In the *Matter of the Mayor of New York*, 11 John. 80, the court said: "Taxes" mean burdens, charges, or impositions, put or set upon persons or property for public uses. Thus interpreting the term, they held that a statute of New York, which declared "that no church or place of public worship, nor any school house should be taxed by any law of this State" did not exempt a church from the liability to pay for the opening of a street in a ratio to the benefit or advantage derived from it. The language was considered as referring to the general and public taxes for the benefit of the town, county, or State at large.

In the present case the same language substantially was used by the legislature, and with the like import. There would be no propriety in applying the exemption to a liability for a share of an expenditure which, though it contributed to promote the public comfort and convenience, contributed also to the comfort and convenience of the inmates of the asylum, and directly enhanced the value of its property. If the defendants should think proper to-morrow to

sell the land and choose a sight elsewhere, would they not derive a direct benefit from this improvement? And why should they not pay for it? Qui sentit commodum, sentire debet et onus. LAFAYETTE v. ORPHAN ASYLUM.

Judgment affirmed.

BYRNE v. RIDDELL et al.

4	3
49	1080
4	3
117	978

The surety in a bond given for an appeal taken after the lapse of ten days from the notification of judgment, will be bound, in case the appellant be cast, only for costs, though the bond was for an amount large enough for a suspensive appeal, and the surety bound himself, in case the appellant should be cast and fail to satisfy the judgment, "to satisfy whatever judgment may be rendered against him." C. P. 578. *Per Curiam*: The bond must be construed with reference to the articles of the Code of Practice applicable to the subject matter.

The "costs" for which the surety on a bond given for a devolutive appeal is bound, are the costs both of the lower court and those of the appeal.

A PPEAL from the Third District Court of New Orleans, *Kennedy, J. Collens*, for the plaintiff. *Bartlette*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. A judgment was rendered in favor of the plaintiff against *Banks* by default, for the sum of \$362 50 and costs. This judgment was duly notified to *Banks*, in December, 1845. In May, 1846, *Banks* presented a petition, in which he prayed for a suspensive appeal from the judgment. Upon this petition the court granted the following order: "Let an appeal be allowed in this case, returnable in the Supreme Court on the third monday of June, 1846, on the appellant's giving bond in the sum of \$600, with *J. L. Riddell* as security, conditioned as the law directs." On the same day an appeal bond was filed, drawn in the usual form, for the sum of \$600. The Supreme Court having rendered a judgment dismissing the appeal, a *feri factas* was issued and returned "*nulla bona*." A rule was then taken by the plaintiff upon *Riddell*, as surety in the appeal bond, to show cause why he should not be adjudged to pay the amount of the judgment and costs. To this rule *Riddell* answered that, the appeal of *Banks* was devolutive, and that his liability was only for the costs of the appeal. The court condemned the surety to pay the amount of the judgment and costs; and he has appealed.

Our first inquiry is, was the appeal suspensive or devolutive? If an appeal be taken within ten days after notification of judgment it shall stay execution, says the Code of Practice, provided the appellant give his bond, with a proper surety, for a sum exceeding by one-half the amount of the judgment, &c. But if the appeal have been taken after the ten days have expired, "*the appeal shall not stay the execution of the judgment*." Such is the imperative language of art. 578. It will be observed that the order granted by the judge does not, in terms, say, a suspensive appeal was allowed. But suppose it had said so: It would have been in direct violation of the law, and being rendered *ex parte*, could not affect the plaintiff's right to execution, which was acquired by the expiration of the legal delay. It is therefore clear, that, the plaintiff could have executed the judgment after the appeal was granted. The appeal was merely devolutive. But the plaintiff contends, that she silently submitted to the order, as one granting a suspensive appeal; that she did not attempt to execute the

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judgment pending the appeal; and that *Banks* thus had the benefit of a suspensive appeal. But her construction could not change the legal effect of the order; and this too as against a surety, whose obligation is not to be extended. The question is, not what she supposed her rights to be, but what they really were. If she had issued a *feri facias*, after this order of appeal was granted, could *Banks* have been permitted to enjoin upon the ground, that execution had been suspended? We think not.

Considering the appeal devolutive, our next inquiry is, what is the extent of the surety's liability? It is true that the amount of the bond was \$600, an amount which more than covers the judgment and probably costs. It is also true, the condition of the bond was, "that the above bound *Banks* shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said *Riddell*, surety, shall be liable in his place." But the language and intention of the bond, must be construed with reference to the articles of the Code of Practice applicable to the subject matter. When the appeal is devolutive, the extent to which security is to be required is such a sum as the court may deem sufficient for the payment of costs. Costs are the measure of the indemnity to be provided for the appellee, and consequently of the surety's liability. C. P. 578.

The appellant contends that by "costs," is meant costs of the appeal. The language of the english text is ambiguous; but this ambiguity may be aided by reference to the french text, which is clear—"pour sureté du paiement des frais, tant en première instance qu'en cas d'appel."

Judgment reversed; and judgment is rendered in favor of plaintiff against *J. L. Riddell*, for the amount of the costs incurred in the prosecution of the suit of the plaintiff against *Banks*, in the District and in the Supreme Court, and the costs of the motion against the surety in the court below; for the ascertainment of which costs the cause is remanded. The plaintiff to pay the costs of this appeal.

MATTER OF EXCHANGE ALLEY.

A report made by commissioners appointed, on an application to open a street, under the provisions of the stat. of 3 April, 1832, was recommitted with directions to make a new report within a certain delay, but no report was made within the time. Subsequently, after a rule had been taken by a party interested to show cause why the proceedings should not be dismissed, but before its trial, an amended report was filed, which, on a compromise between the plaintiff in the rule and the petitioners for opening the street, was confirmed and homologated. There was no evidence that the appellant, who was a party, had appeared, or had any knowledge of the proceedings after the recommitment of the report. Held, that no order of extension having been made when the period within which the report was to be returned was about to expire, the appellant cannot be bound by the *ex parte* homologation.

The stat. of 3 April, 1832, authorizing a municipal corporation to take the property of a citizen for public use, to be paid for by others supposed to be benefited thereby, being in derogation of the rights of property, must be strictly construed.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Preaux*, for the Municipality. *Micou*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. This proceeding has been conducted in an extremely dilatory and unsatisfactory manner; and the result has been a judgment affecting the rights of the appellant *Dussau* without his presence, and, so far as we can judge by the record, without a proper opportunity afforded to him of being heard.

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LEY.

A report had been filed by the commissioners, which was opposed; and, on the 24th April, 1846, a judgment was signed referring back the report to the commissioners, twenty days being allowed to them to make a new report. No report was filed within the delay. On the 22d June, 1846, two of the parties interested, *Blanchard* and *Kain & Stroud*, moved to dismiss the proceedings, for want of compliance with this order. This motion was granted, with a qualification. The proceedings were dismissed with leave to the municipality to move to set aside the judgment within five days from the service thereof on the mayor, upon cause shown. A motion to reinstate was made within the delay fixed, and the cause was reinstated. Ten days was allowed the commissioners to file a new report. Within the ten days, on motion of the municipality, the delay for reporting was extended to two months. The commissioners again neglected to report within the delay, and no application was made to extend the time. In December, 1846, *Duncan* and *Blanchard*, as parties interested, obtained a rule on the municipality to show cause why the proceedings should not be dismissed. Before it was heard, the commissioners filed an amended report; *Duncan* and *Blanchard* opposed; the case was continued from time to time, and at length the opponents having made a compromise with the municipality, the report amended in pursuance of the compromise was confirmed and homologated.

There is no evidence in the record that *Dussau* either appeared, or had any knowledge of these proceedings, after the order, in April, 1846, to send the case back to the commissioners. We are not prepared to say that a new notice by publication is necessary upon the filing of a new report. The case in 19 Wendell, 682, upon the similar statute of New York decides the reverse. If, from time to time, as the delay granted was about to expire, orders of extension had been made, it might perhaps be just to say that the appellant, having been once properly brought into court, should be held to implied notice of such extension. But where there were such repeated defaults on the part of the commissioners, unexcused by timely orders of continuance or extension, to hold the appellant to the *ex parte* judgment which has been rendered against him, would be to say, that he was bound to perpetual vigilance, in watching day by day the minutes of the court, while the municipality remained inactive, and the commissioners disregarded and disobeyed the orders of the court.

The power to expropriate the citizen against his will for purposes of public utility, is a power the exercise of which should be strictly construed; and in our opinion we should open the door to dangerous abuse, if we were to hold the appellant under proceedings so irregular as are presented by this record. See the case of the *Application of the Mayor, &c.*, 4 Rob. 358.

It is, therefore, decreed, that the judgment of the court below be reversed, and that this cause be remanded for further proceedings according to law; the appellee paying the costs of this appeal.

COCHRANE v. MURPHY.

Where a verdict allows no interest, the court, in rendering judgment on the verdict, can allow none. If the interest be omitted through inadvertence, the error may be corrected before the verdict is closed; if the jury refuse to allow interest when due, the remedy is by an application to set aside the verdict and for a new trial.

Where the verdict of a jury allows no interest in a case in which it was due, and the plaintiff prays for a new trial on the general ground of the verdict being contrary to law and evidence, and on certain special grounds, but no relief is asked against the error in the omission to allow interest, the judgment will not be altered so as to subject the appellee to the costs of the appeal, where the amount of interest is but small.

APPEAL from the Second District Court of New Orleans, *Canon, J. Durrell and Greiner*, for the appellant. *W. E. Murphy*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

EUSTIS, C. J. This suit is brought to recover the sum of \$2,158 50, the alleged balance due on the price of a cargo of coals. The substance of the defence is, that the defendant sold the coals on commission. He admits that the balance due the plaintiff on the sale of the coals is \$628 50, according to an account which he has exhibited. The plaintiff prayed for a trial by a special jury of merchants, which was had, and the jury found a verdict for the sum admitted to be due by the defendant. After an unsuccessful attempt to obtain a new trial, the plaintiff has appealed from the judgment rendered in accordance with the verdict.

There are several bills of exceptions taken by the counsel for the plaintiff, but we think none of them tenable. The decision of the district judge on the points raised is so obviously correct, that no further notice of them is deemed necessary.

In relation to the facts of the case we have to observe that, the evidence, as it appears nakedly on paper, does not satisfactorily account for the quantity of coals which it would appear the defendant received. As the testimony is at variance as to the quality of the coals, that is, as to the proportion of dust coal in the lot, and as it remained for more than a month, during the sales, on the levée, we presume the jury were satisfied that the defendant accounted for all for which he was responsible, and that the quantities of dust coal for which the defendant charged himself in the account was all that remained undisposed of. A special jury having passed upon a fact of this kind, we do not feel ourselves called upon to interfere with their verdict.

The verdict gave the plaintiff no interest, and the judgment followed the verdict. The plaintiff asks that the judgment be changed in that respect. This change, if allowed, would throw the costs of the appeal on the appellee.

The Code of Practice, art. 522, makes it the province of the jury to decide claims for interest on sums of money in litigation; and where the verdict allows no interest, we believe the rule is settled, that the court in rendering judgment on the verdict can allow none. If the interest is omitted by inadvertence on the part of the jury, the error can be easily corrected before the verdict is closed; and if the jury refuse to allow interest before it is due, the remedy of the party is by an application for setting aside the verdict and a new

trial. *Bedford v. Jacobs*, 5 Martin N. S. 448. *Commandeur v. Russell*, Ibid. 461. *Dule v. Downs*, 7 Martin N. S. 225. *Chain v. Kelso*, Ibid. 263.

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The plaintiff made his application on the general grounds of the verdict being contrary to law and evidence, and on the special ground of error on the part of the judge in his charge to the jury, and in his admitting evidence which was excepted to, but no relief was asked against this error in the allowance of interest. Had the application been made, *non constat* that it would not have been granted, or the application acquiesced in by the defendant. In such a case we are not at liberty to subject the appellee to the costs of the appeal by altering the judgment appealed from. *Grailhe v. Hown*, 1 An. R. 440.

Judgment affirmed.

MATTER OF CLAIBORNE STREET.

Under the statute of 3 April, 1832, regulating the opening and improving of streets and public places in the city of New Orleans and its suburbs, the court before which the proceedings have been instituted can, in no case, amend an assessment made by the commissioners. The report must be approved, or rejected, *in toto*; and in the latter case, the court is bound either to appoint new commissioners, or to refer the whole matter back to the same.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Dufour and Bodin*, for the appellants. *Beauregard*, contra. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. This case has been presented to us by agreement of the parties upon a very imperfect record. Whether the appellants have a right to treat the proceedings as void for alleged informalties in their inceptions, we refrain from now deciding. The question is important, and one which ought not to be decided without the knowledge by this court of the pleadings and proceedings in the court below.

But whatever the previous pleadings and proceedings may have been, it is obvious that the final judgment of the court below cannot be maintained. An opposition to the report of the commissioners was sustained by the court, an amendment decreed, and the report so amended homologated. In the case of the *Application of the Mayor, &c.*, 4 Rob. 357, it was held that, the court cannot amend an assessment; that the report must either be approved, or referred to the same (or new) commissioners. That opinion is in accordance with the terms of the statute, and with the opinion of the Supreme Court of New York. 20 Wendell, 620.

It is, therefore, decreed that the judgment of the court below be reversed, and that this cause be remanded for further proceedings according to law; the appellee paying the costs of this appeal.*

*A similar decision was rendered, at the same time, on another opposition, made by *Dubart*, to the same report.

JONES et al. v. CROCKEE.

The pendency of an action in which one of the joint proprietors of a lot of ground claims from his co-proprietor a sum for improvements, with a privilege upon the lot, cannot prevent the latter from obtaining a partition of the property until the claim is settled. *Per Curiam*: Such a claim is to be taken into account in making the partition, but cannot prevent it. C. C. 1272.

It is no objection to a judicial partition that the experts selected to form the lots under article 1289 of the Code, had acted as appraisers when the property was inventoried.

A notary is not bound, under art. 1290 of the Civil Code, when contestations arise in the course of a partition, to prepare, in all cases, a *procès-verbal* of the objections and declarations of the parties, and to suspend his proceedings and refer the parties to the judge having cognizance of the partition for his decision thereon. He must exercise a sound discretion in ascertaining when they are serious, and, when satisfied that they are not, should disregard them.

Where a partition, made by a notary, provides that a party who had drawn one of the lots into which the property was divided, should pay a certain sum to his co-proprietor on account of the greater value of the lot drawn by the former, judgment should be rendered in favor of the latter for the amount, at the time of homologating the report. The party should not be compelled to institute a separate action for the amount.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Micou*, for the plaintiffs. *A. Hennen*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

Rost, J. By the decree of this court, reported in 1 An. p. 442, the plaintiffs were decreed owners, and recovered of the defendant, an undivided half of a town lot in this city. The object of this suit is the judicial partition of the property, and the defendant has appealed from the judgment homologating the partition which has been made.

The defendant first excepted to the action, on the ground that there was already a suit pending, in which he claimed of the plaintiffs sums of money for improvements, etc., with privilege upon the lot, and that no partition could take place until that account was settled. The District Court properly overruled this exception. Claims of that description are to be taken into account in making the partition, but cannot prevent it. C. C. 1272.

After the exception had been overruled, two partitions were successively made, and, on the opposition of the defendant, set aside, on account of informalities. The parties were a third time referred to the notary, who proceeded to appoint and swear experts to form the lots, under art. 1829 of the Civil Code. The defendant then claimed the right to choose and nominate one of the experts. He nominated *Mark Walton*, and requested an adjournment of one hour, for the purpose of producing him. This request having been acceded to by the plaintiffs and the notary, after the expiration of an hour and a half the defendant did not return, and his counsel stated that he could not find *Mark Walton*; whereupon the notary having directed the experts originally appointed to proceed, the said counsel of the defendant objected that the experts named were the same persons who had previously acted as appraisers in the inventory of the property, and that they were incompetent on that ground. He asked that the competency of the experts might be referred to the judge of the partition, and the proceedings therein suspended, until his opinion was had. But the notary being of opinion that this objection was unfounded in law, and

being moreover required by the plaintiffs to proceed, refused to suspend the proceedings, and went on to complete the partition.

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The defendant's counsel assigns this refusal of the notary as an error which vitiates the partition. He contends that, under art. 1290 of the Civil Code, when contestations arise in the course of a partition, it is the duty of a notary in all cases to make a *procès-verbal* of the objections and declarations of the parties, to suspend his proceedings, and to refer the said parties to the judge of the partition for his decision on them.

This interpretation would put it in the power of a tenant in common to defeat at pleasure the action of partition. Whenever contestations arise, it is the duty of the notary to exercise a sound discretion in ascertaining whether they are serious, and when he is satisfied they are not, he is to disregard them. That discretion was correctly exercised in this case. The circumstance that the experts selected had on a former occasion appraised the property, could not disqualify them.

The grounds of the opposition made by the defendant to the homologation of the partition, and the bills of exception taken by him in the course of the proceedings, are of too frivolous a nature to require special notice.

The plaintiffs, in taking the rule for the homologation of the partition, ask a judgment against the defendant for \$500, this being the sum which, under the partition, he is to return to them, on account of the greater value of the lot drawn by him.

The District Court refused to give the judgment. It simply homologated the partition, and decreed to each of the parties to it the lots respectively assigned to them therein, leaving the plaintiffs to institute a separate action for that sum. We think the judgment should be amended so as to insure to the plaintiffs the possession of the return in money, as well as that of the town lot assigned to them.

It is, therefore, ordered that the judgment in this case be amended, so that the defendant be decreed the separate owner of the town lot assigned to him in the partition, and that he pay the said plaintiffs the sum of \$500, with interest from this date and costs. It is further ordered that the judgment as amended be affirmed, with costs.

HYDE et al. v. CULVER et al.

Advances made to the captain and owners of a steamer in the home port, to enable him to pay for stores and provisions for the boat, arrears of wages due the crew, and for expenses due to third persons upon merchandize shipped on the steamer, confer no privilege; the party by whom the advances are made is not legally subrogated to the privileges of the furnishers of provisions and crew. The word *supplies* in the 8th paragraph of art. 3204 C. C. applies to materials sold or furnished to the vessel, and not to advances of money.

The 7th paragraph of art. 3204 applies to sums lent the captain, at a port not the home port, in the absence of the owner, and for the necessities of the vessel, that she may be enabled to complete her voyage.

Advances made to the captain and owner of a steamer in a home port, to enable him to pay charges due to other parties on merchandize, in order to procure it as freight for his steamer, are not such advances as are contemplated by paragraph 8 of art. 3204 of the Civil Code.

HYDE
v.
CULVER.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Reynolds*, for the plaintiffs. *Van Dalsen and Micou*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. The question presented in this cause is whether the plaintiffs are entitled to a privilege upon the steamer *Yazoo*. The claim is resisted by *Hunt & McDonogh*, subsequent purchasers.

The material facts are as follows: *Morrison & Co.*, of whom *John Eaton* was a partner, sold the steamer at New Orleans, in May, 1847, to *Culver*, then a resident of New Orleans, where the boat was enrolled in his name. On the 2d August, 1847, the plaintiffs advanced at New Orleans, to *Culver*, then the captain and owner of the boat, the sum of \$12,000; and took *Culver's* draft upon himself at St. Louis, at three days sight, for that amount, which *Culver* accepted at St. Louis, on the 14th August. The petition alleges, and the evidence shows, that this sum was advanced by plaintiffs to *Culver*, for the purpose of enabling him to pay for stores and provisions for the boat, arrears to the crew for wages, and freight and charges due other parties upon goods shipped by the *Yazoo* at New Orleans, for St. Louis. We understand by the latter item, that the *Yazoo* had obtained the carriage of these goods to St. Louis, upon condition of advancing to the New Orleans consignees the freight and charges previously incurred in bringing them to New Orleans from other ports. On the 17th August, 1847, *Culver* sold the steamer to *Eaton*, and, on the 14th September, 1847, *Eaton* sold her to *Hunt & McDonogh* of St. Louis, who upon the levy of the sequestration issued in this cause claimed the boat. The vessel was duly enrolled in St. Louis in the names of *Eaton* and *Hunt & McDonogh* respectively. She arrived here, in October, 1847, and was seized on the 15th of that month.

As there is no sufficient ground to dispute the ownership of *Hunt & McDonogh*, the case rests upon a question of privilege.

The advance was made to the owner, at the vessel's home port; and under the authority of repeated decisions of our predecessors, conferred no privilege. In the case of *Grant v. Fiol*, 17 La. 158, the intervenors, *Sloo & Byrne*, claimed a privilege for a sum of money which, they alleged, was loaned by them to the owner of the vessel, and was applied to the payment of the ship-carpenter, sail-maker, and crew of the vessel, in order to enable her, by the payment of those claims, to prosecute her intended voyage. It was then held that the expression *supplies*, (*fournitures*), used in the 8th paragraph of art. 3204 of the Civil Code, applied to materials sold or furnished to the vessel, not to money or funds advanced. It was also held that the subsequent application of the money by the ship-owner to the payment of carpenters, sail-maker, and crew, privileged creditors, did not operate to the lender's benefit; that there was no legal subrogation, and no conventional subrogation was pretended; that privileges were *stricti juris*, and not to be extended by implication or analogy. The doctrine laid down in *Grant v. Fiol*, was reiterated in the cases of the *Agricultural Bank v. The Barque Jane*, 19 La. p. 1, and *Hill v. The Phoenix Tow Boat Co.*, 2 Rob. 36.

The case of *Grant v. Fiol* is in accordance with the french authorities. The 8th paragraph of the article 3204 is taken almost verbatim from the french Code de Commerce. The same meaning is attributed there to the expression "*fournitures*." See *Boulay Paty*, vol. 1, p. 599. It is also the doctrine there, that those who have lent the owner money to pay workmen, &c., have no privilege, unless they have taken a subrogation. "On ne peut, par aucune raison

d'analogie, étendre ce privilège à ceux qui auraient fourni des sommes d'argent, quoique pour les mêmes objets. Ces prêteurs ont dû, suivant ce que nous avons dit no. 219, se faire subroger aux droits de ceux que leur argent servait à payer, s'ils voulaient être substitués à leur privilège : ou bien, ils devaient prêter à la grosse." Pardessus, Droit Commercial, part. 4, tit. 8, ch. 1, no. 954. See also Deville & Massé, *verbo* Navire, § 5, no. 74.

But the district judge considered this case as falling under the 7th paragraph of article 3204. We do not concur in this opinion, and a brief notice of the paragraph is proper. Its language is : "Sums lent to the captain, for the necessities of the ship during the last voyage, and the reimbursement of the price of merchandize sold by him for the same purpose." It is taken without change from the french Code of Commerce, art. 191, no. 7.

The paragraph undoubtedly applies to sums of money lent to the captain at a port not a home port, in the absence of the owner, and for the necessities of the vessel, that she may be enabled to complete her voyage. This is obvious from the expression "during" the last voyage : "pendant le dernier voyage." The intention of the law-giver may also be ascertained by looking at the adjoining words, according to the familiar rule, *noscitur a sociis*. The paragraph associates with "sums lent to the captain for the necessities of the ship during the last voyage," "the reimbursement of the price of merchandize sold by him for the same purpose." The only case in which the extraordinary power can be exercised by the captain, of selling a part of the merchandize laden on board his vessel, is where he is compelled by imperious necessity to do so, in order to enable him to carry on the residue. The two classes of claims are therefore properly associated, and they take rank over the claims enumerated in the following paragraphs (nos. 8 &c.) although the latter are precedent in point of time, upon the reasonable and just principle that it is to be presumed, if the necessary expenditures, to meet which the loans were obtained or the cargo was sold, had not been made, the vessel would not have been able to return : *sine quibus navis salva provenire non poterat*. The french commentators are concurrent in this interpretation, and its correctness seems to us unquestionable. See Rogron, Code de Commerce, notes to art. 191. Delvincourt, vol. 11, notes to page 185. Pardessus, Droit Com. no. 954. Le Nouveau Valin, tit. 1, p. 7, *et seq.* Ord. of Wisbuy, no. 45.

We have not deemed it necessary to enlarge upon the peculiar character of the object for which the advance was in part obtained, to wit : to pay charges to other parties for anterior freight, and thus to get freight for the steamer. We do not wish however to be considered as recognizing such an object as falling within the purview of the 8th paragraph of art. 3204.

It is, therefore, decreed, that the judgment of the court below appealed from, be reversed, and that there be judgment in favor of the claimants, *Daniel B. Hunt and William McDonogh*, with costs in both courts.

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CULVER.

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## DEVRON v. FIRST MUNICIPALITY.

An injunction will not lie to restrain a municipal corporation from instituting suits before a justice of the peace, against a party for infractions of an ordinance of the municipality,

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where an appeal will lie from the decisions of the justice to the Supreme Court. The jurisdiction of the justice cannot be thus interfered with.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J. Redmond*, for the appellant. *Preaux and Morell*, for the defendants. The judgment of the court (*King, J. absent.*) was pronounced by

EUSTIS, C. J. This is an appeal taken by the plaintiff from a decree of the First District Court of New Orleans, dissolving an injunction which had been granted by the judge against the municipality, prohibiting the institution of suits against the plaintiff for contraventions of a certain ordinance of the municipality prohibiting the sale of groceries in the vegetable market, &c. This injunction had been granted in a suit instituted by the plaintiff against the municipality for the purpose of testing the validity of said ordinance, and to recover the sum of \$500 damages, by reason of the interference of said municipality with the business of the plaintiff as a grocer in said market.

The plaintiff can test the legality of the ordinance by a direct appeal from the decision of the justices of the peace to this court, and the jurisdiction of the justices of the peace, we think, ought not have been interfered with by prohibiting the institution of suits, on the showing of the plaintiff made out in his petition. As we think the injunction ought not to have issued, we do not find the court erred in dissolving it.

*Judgment affirmed.*

### WALKER v. CALDWELL.

Where, after a third person had been made a party to an action in place of the original plaintiff and recognized as such, defendant excepts to his right to sue as plaintiff, praying that the action may be dismissed, and the exception is sustained and the motion to make him a party to the proceeding is refused, no appeal will lie from the judgment of refusal. *Per Curiam*: The judgment ought to have been in conformity with the conclusion of the exception that the suit be dismissed; and from such a judgment an appeal might have been sustained.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Reynolds*, appellant, *pro se. Larue*, for the defendant. The judgment of the court (*King, J. absent.*) was pronounced by

EUSTIS, C. J. This suit was instituted by *Alexander Walker*, as liquidator of the *Atchafalaya Banking Company*, against the defendant, as a stockholder, for the recovery of a certain sum alleged to be due the bank by way of contribution on his stock. Before issue joined, *M. M. Reynolds*, the appellant, on suggesting his appointment as the successor of *Walker*, was made a party to the suit, and recognized as such. The defendant, among other exceptions to the right of the appellant to sue as plaintiff, objected to the validity of the act of the legislature, under which he was appointed, as being in conflict with the 119th article of the constitution, and of this opinion was the district judge, who decreed that the exception above recited "be sustained, and the motion to make *M. M. Reynolds* a party to this proceeding be refused, with costs." From this decree the appeal is taken.

The appellant had been for months previously the party plaintiff in the suit, and the exceptions were made to his right to stand in judgment as such.

The effect of the decision of the district judge undoubtedly was to put the appellant out of court; and such would have been the decree had it been asked for at the trial. There was no motion pending to be decided. The decision was made on the issue tendered by the exception, and it ought to have been in conformity with the conclusions of the defendant, viz. that the suit be dismissed. From such a decree the appeal could have been sustained. But our impression is that the decree of the district judge is not of that character from which an appeal can be taken, and that the present appeal is premature. The matter appears to have been an oversight, which can be easily remedied by the district judge decreeing that the exception of the defendant be sustained, and that the said *Reynolds*, as plaintiff, be hence dismissed.

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*Appeal dismissed.*

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### PENN v. THE FIRST MUNICIPALITY.

An appeal taken from a decision of a justice of the peace will be dismissed, where it is impossible to examine the question as to the legality of a city ordinance imposing a penalty, without exceeding the jurisdiction of the court by deciding other matters presented in the case, of which it has no jurisdiction. The jurisdiction of the Supreme Court on appeals, involving the constitutionality or legality of fines, forfeitures and penalties, under \$300 in amount, imposed by municipal corporations, is confined to the questions of the constitutionality or legality of such fines, forfeitures and penalties. Const. art. 63.

**A** PPEAL from a decision of a Justice of the Peace in New Orleans. *Beau-regard*, for the plaintiff. *Preaux* and *Morel*, for the appellants. The judgment of the court (*King*, J. absent,) was pronounced by

*Eustris*, C. J. This is an appeal from a judgment rendered by the Fifth Justice of the Peace for the parish of Orleans, in a suit in which the plaintiff seeks to recover the sum of \$10, the amount of a fine imposed on her by a judgment of the recorder of the first municipality for a violation of a certain ordinance of said municipality, which fine was paid by her in order to avoid imprisonment in the work-house, according to the judgment of the said recorder.

The justice of the peace gave judgment against the municipality for the amount of the fine and costs, on the ground that the proceedings before the recorder were *coram non judice*, he being entirely without jurisdiction of the suit which forms the basis of the plaintiff's demand; and decided that the money, being illegally obtained, must be restored to the plaintiff, with costs. The municipality has appealed, and the argument addressed by counsel to the court relates to the legality of the ordinance under which the fine was imposed. The justice who decided the case did not decide this point, but confined himself exclusively to the jurisdiction of the recorder; and it is obvious that there are other matters of a grave character involved in this suit, some of which have been noticed by counsel, besides that which involves the legality of the ordinance. It follows, therefore, that there are other points which this court are called upon to decide, over which it has no jurisdiction, in order to reach the matter of which it has jurisdiction.

This case presents the same difficulties as that of *The Third Municipality*

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*v. Blanc.* 1 Annual Rep. 385. We there held, that the 63d article of the constitution gave this court jurisdiction in all cases where the constitutionality or legality of any fine, forfeiture, or penalty imposed by a municipal corporation was involved; but that our power was confined to an examination of those questions, and that this clause gave us no jurisdiction over matters to which it did not extend by virtue of the said 63d article.

The legality of municipal ordinances can be brought before this court by direct appeal, and the court having no jurisdiction over the amount in dispute between those parties, and it not being possible to examine the question of the legality of this ordinance without exceeding our jurisdiction in passing on other matters presented in this case, we consider that no appeal lies to this court from the judgment against the defendants.

*Appeal dismissed.*

### GIBSON v. WHITE et al.

Where a plaintiff claims a fourth-interest in a slave, and certain persons intervene in the action claiming the other three-fourths, she may appeal from a judgment dismissing the action without making the intervenors parties to the appeal. They might choose to submit to the decree, and she had a right to have her claim considered.

Where a plaintiff, who had bonded a slave seized under a sequestration, was ordered to produce him at the trial for the purpose of identifying him, but, on failing to produce him, "offered to admit any fact which the defendant will state that he could prove by the presence of the slave, and which could not be proved in his absence," the defendant cannot, under such circumstances, be injured by bringing the cause to a hearing on the merits.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Fraser*, for the appellant. *Lockett, Gould and Nautré*, for the defendants. The judgment of the court (*King, J.* absent,) was pronounced by

*SLIDELL, J.* This suit was originally instituted by *Frances Gibson*, who claimed in her own right to be sole owner of a slave which forms the subject of the present controversy. Afterwards *Rebecca* and *Rachel Gibson*, and *Frances Gibson*, as tutrix of the minor *James Gibson*, intervened, and claimed the slave as the property of *Rebecca, Rachel, James* and *Frances Gibson*. From a judgment dismissing the suit, *Frances Gibson* alone appealed. Several months after the defendant had filed a brief sustaining the correctness of the judgment rendered by the court below, and urging its affirmance, one of the persons called in warranty asked the dismissal of the appeal upon the ground that *Rebecca, Rachel*, and other intervenors had not joined *Frances Gibson* in the appeal, and had not been made parties to the appeal.

Upon the pleadings we consider *Frances Gibson* as asserting title to an undivided interest of one-fourth in the slave; and if she chose to appeal alone, we do not think she was bound to bring her co-claimants before us. They had a right, if they chose, to submit to the decree; and she has a right to have her claim to the undivided fourth considered. Our decree of course only affects her interest in the controversy. We may further remark that it is doubtful, whether the motion to dismiss was made in time.

The only point which remains to be considered is, whether the judgment of the court below dismissing the suit so far as concerns the appellant *Frances Gibson*, is correct. The plaintiff, *Frances Gibson*, had bonded the slave after

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sequestration; and had been ordered, on motion of a defendant, to produce the slave in court at the trial of the cause, "for the purpose of identifying him." The slave was not produced; and upon suggestion by the plaintiff that there had not been sufficient time to produce him, the cause was continued, with an order to plaintiff to produce him on the next trial day. When the day of trial arrived, the slave was not produced; whereupon the plaintiff "offered to admit any thing the defendants would state they could prove by the presence of the slave, which could not be proved in his absence; which offer to admit being rejected by defendant's counsel," the court dismissed the suit.

We think the court erred. The appellant, under the circumstances, is prohibited by the 139th article of the Code of Practice, which says: "Courts may likewise, at the request of either of the parties, order that the other shall bring into court the object in dispute of which he is in possession, if it be a slave or such moveable property as can be produced, in order that it may be shown by testimony that it is in reality the object claimed; and if the party refuse to comply with the order, the refusal shall be considered as full proof of the identity of the object." It is also to be observed, that the plaintiff's offer to admit was very comprehensive; and we have been unable to see how the defendants could have been injured by bringing the cause to a hearing on the merits, under such circumstances.

Any consideration of the legal consequences of the alleged violation of the bond by taking the slave out of the State, seems to us premature.

It is, therefore, decreed, that the judgment of the court below dismissing the suit, so far only as it affects *Frances Gibson* individually, be reversed, and that this cause be remanded for further proceedings according to law; the defendant *Charles White*, paying the costs of this appeal.

### MILLAUDON v. NEW ORLEANS INSURANCE COMPANY.

Where sugar and molasses contained in a sugar-house, and covered by an ordinary fire policy, are destroyed by an explosion of the steam boilers used in manufacturing sugar, the damage having been produced by the explosion, and not by fire, the insurers will not be responsible. *Per Curiam*: The chances of loss from explosion, are not the same as those from fire.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Carter and Grymes*, for the appellant. *Benjamin and Micou*, for the defendants. The judgment of the court (*King, J.* absent,) was pronounced by *EUSTIS, C. J.* This is an action to recover from the defendants the value of a quantity of sugar and molasses, destroyed in the sugar house of the plaintiff, by the explosion of the steam boiler which was used in the manufacturing of sugar, the loss being alleged to have been caused by fire. The sugar and molasses was covered by an ordinary fire policy, and the value of the articles destroyed is proved to be \$6,500. The district judge being of opinion that the loss was not within the policy, gave judgment for the defendants, and the plaintiff has appealed.

The damage done by the accident is confined exclusively to that produced by the explosion, none having been done by fire. The district judge was of opin-



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ion that there is a material difference between the risk of explosion of a steam boiler and that of fire, and that this difference is established by the popular and ordinary meaning attached to each; and, if in a policy on articles in a manufactory worked by steam power it was intended to cover a loss by explosion, when there was no conflagration, an additional premium would be asked by the insurers. We concur in this opinion, and it is supported by the obvious fact that the chances of loss by explosion are not the same as those from fire, the former being dependant on the condition of the machinery, the mode in which it operates, and the care and attention with which its operation is overlooked.

Steam has been for years the motive power in manufactories in England and parts of the United States, and accidents by explosion have often occurred. As has been observed by the district judge, it is remarkable that no case has been found in which a recovery has been had on a fire policy for a loss by explosion. It is but fair to infer that the risks are considered as different.

The counsel for the plaintiff has referred to the case of the steamer *Lioness*, reported in 11 Peters, 213. The insurance was on the *Lioness*, which was destroyed in Red river, by the explosion of gunpowder, with which she was partly loaded, which explosion was charged to have been occasioned by the carelessness and neglect of her officers and crew, in carrying a lighted candle or lamp in the hold. The steamer was insured against fire, and the court was opinion that, as the explosion, as stated in the pleas, was caused by fire, the latter was the proximate cause of the loss. We do not think that there was any thing decided in that case which is applicable to the facts of this. So far as relates to the insurance, we are unable to distinguish a loss occasioned by the explosion of the boiler. from that caused by the breaking or derangement of any other part of the machinery.

*Judgment affirmed.*

### TAYLOR et al. v. BURKE et al.

Decision in *Hewitt v. Waterman*, 3 An. 716, affirmed.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* *T. R. Wolfe*, for the plaintiffs. *Grymes, Kendall* and *Howard*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by *SLIDELL, J.* This case involves the same question of law and fact as that of *Hewitt et al. v. Waterman et al.*, recently decided, 3 An. 716. The verdict of the jury is fully sustained by the evidence.

*Judgment affirmed.*

### TILLMAN, Trustec, &c. v. DRAKE.

The only effect of a deed of trust or common law mortgage in the countries where they are used, is to establish a lien upon property. A deed of trust has none of the essential requisites of a sale; it conveys no property, is not made in consideration of a price, or of a merely nominal price only, is not necessarily accompanied by a change of possession, and

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is intended only as a security for the payment of a debt. Under our laws it cannot be held to confer any higher right than that of a mortgage.

Where slaves conveyed to a trustee by a deed of trust executed in another State, are subsequently brought into this State, the deed must be recorded here to give it effect as a mortgage against third persons; and where, in such a case, the deed has not been recorded here, and the grantor sells the slaves to a third person ignorant of the deed, the lien will be lost; nor can it be revived against the property in the hands of a vendee of such third person, though he purchased with knowledge of the deed. The last purchaser is protected by the good faith of his vendor.

**A** PPEAL from the Parish Court of New Orleans, *Maurian, J. I. W. Smith*, for the plaintiff. *Carter*, for *Cowand*, appellant. The judgment of the court was pronounced by

**KING, J.** In order to secure the estate of *Samuel Escue*, against the consequences of his suretyship upon an administrator's bond, *Leonard C. Temple* executed a deed of trust, in the State of Tennessee, in 1838, in favor of the plaintiff, to operate upon several slaves who were then in the State of Mississippi. The deed was recorded in the State of Mississippi, where the slaves remained in the possession of *Temple* until 1840, when he brought them to this city, and sold two of them to *Cowand*, who, in March, 1843, conveyed one of them, to wit, the slave *Hannah*, to the defendant. This slave, and her child since born, are claimed by the plaintiff, in the present action. A judgment was rendered in his favor in the court below, and the defendant has appealed.

It is shown by the evidence that a deed of trust, by the laws of the State of Mississippi, conveys the legal title to the trustee, and that no alienation of the property by any other person than the trustee would convey title to the purchaser. Also, that a deed of trust is a mode of securing debts in that State, and more usually resorted to than a mortgage, as it confers upon the trustee the right of selling without a previous decree of court. The testimony in relation to the character and operation of instruments of this kind is substantially the same as that given in the case of *Hopkins v. Lacouture*, 4 La. p. 64. In that case it was said, that the only effect of either a deed of trust or a common law mortgage, in the countries where they are used, is to give a lien upon property. A deed of trust wants the essential requisites of a sale. It conveys no property, is made in consideration of no price, or at most of a price merely nominal, is not accompanied necessarily by a change of possession, and is intended only as a security for the payment of a debt. Although differing in form from a mortgage it is designed to accomplish the same end, and under our laws can be held to confer no higher rights. In order to produce effect as a mortgage against third persons, notice is indispensable. The deed under which the plaintiff claims was never recorded in this State. To supply the absence of notice by registry, the plaintiff had endeavored to establish, by parol, a knowledge of the encumbrance by both the defendant and her vendor, *Cowand*, at the dates of their respective purchases. The testimony on this point has been carefully considered. It is unsatisfactory; and, in our opinion, does not establish that *Cowand* was informed of the existence of the lien at the time he purchased. It is not material to the result to enquire whether the defendant, *Drake*, was notified of the encumbrance prior to the sale of the slave to her. For, conceding that she was notified, her title would be unaffected by the knowledge. The lien was lost by the sale to *Cowand*, in ignorance of the right, and could not revive against the property in the hands of his vendee. The defendant is protected by the good faith of her vendor, *Cowand*, who was a pur-

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chaser without notice, and who, being called in warranty, is the real defendant in this case. Story's Eq. Jur. § 1503, 381, 434.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that there be judgment for the defendant; the plaintiff paying the costs of both courts.

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### CASTAING v. STONE et al.

A party intending to appeal, in a case in which the testimony was not taken in writing, must require the adverse party, or his counsel, to draw jointly with him a statement of the facts proved in the case; and it is only after the refusal of the adversary to join in making the statement, or on the failure of the parties to agree as to the manner of drawing it up, that the judge can be called on for a statement, and this, though the party desiring to appeal was not present at the trial, either in person or by counsel. C. P. 602, 603.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Durant*, for the plaintiff. *Durell and Greiner*, for the appellants. The judgment of the court was pronounced by

**KING, J.** In this case a judgment by default was taken, which was made final against the defendants for the amount claimed in the plaintiff's petition. A part of the testimony adduced before the district judge appears not to have been reduced to writing. After the rendition of the final judgment, the defendants, suggesting an intention to appeal, took a rule on the plaintiff to show cause why the district judge should not make a statement of the facts proved on the trial, to be used in the appellate court. The rule was dismissed, on the ground that the defendants had not previously called on the plaintiff, or his counsel, to prepare the statement jointly with him. The record has therefore been brought up with only that part of the testimony which was taken in writing under commissions, and the clerk so certifies the transcript. On this certificate the plaintiff has moved to dismiss the appeal.

The judge did not, in our opinion, err in dismissing the rule. When the depositions of witnesses have not been taken in writing in the inferior court, art. 602 of the Code of Practice directs, that the party intending to appeal shall require the adverse party, or his counsel, to draw jointly with him a statement of the facts proved in the cause. It is only upon the refusal of his adversary to join in making the statement, or upon the failure of the parties to agree as to the manner of drawing it up, that the judge can be called on for a statement. C. P. 603.

The defendant contends that this rule can have no application to cases in which the party desiring to appeal was not present at the trial, either in person or by counsel, and could not consequently join in making the statement. That a call upon his adversary, under such circumstances, would have been a vain and empty form. In this view we can not concur. It is not to be presumed that an application to his adversary would have been unsuccessful, nor that a statement made by his counsel would have been unfaithful or unsatisfactory. An attorney is the sworn officer of the court, and his statements made under such circumstances must be considered as having been made under the obligations of his professional honor. Every presumption would be in favor of its

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truthfulness and accuracy, as far as his recollection of the facts would enable him to render it so. Although the party desiring to appeal may not have been present at the trial, and may consequently be ignorant of the testimony of the witnesses, it does not follow that he would be dissatisfied with the statement furnished by his adversary. That statement might disclose all the facts upon which he wishes to rely on the appeal.

But, in addition to these considerations, the judge himself may well desire the previous statement of counsel before undertaking to prepare one. The attorney whose attention has been specially directed to the testimony in the preparation of the cause, who was present at the trial, and examined the witnesses, is generally better prepared to present an accurate statement of the facts proved than the judge, who may have heard the testimony for the first time on the trial, and must rely upon his memory, and upon imperfect notes, to retain the facts of that, and probably of a number of other causes heard on the same day. Although the statement of the adverse counsel may not be strictly correct, and may be rejected by the party requiring it, the judge would, in most instances, derive important aid from it in preparing his own statement, when that duty devolved upon him. We think that both the judge and the appellee have the right to insist on the strict observance of the rule prescribed by the Code of Practice.

In consequence of the neglect of the appellant to comply with this rule, an imperfect record has been brought up, containing only a part of the evidence adduced on the trial. The record contains no bill of exceptions, and the assignment of errors was filed after the expiration of the delay allowed by law. The motion to dismiss must consequently prevail.

*Appeal dismissed.*

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### WALKER v. CASSAWAY.

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Where the master of a steamer, by false representations, induces an agent of a third person to ship merchandize on his boat at a certain freight, and the bill of lading states that the merchandize is taken "with the privilege of re-shipping," and the freight is re-shipped on another boat and brought to the port of destination, the owner of the merchandize cannot require its delivery before paying the freight due to the boat on which it was so re-shipped, the contract by the master of the second boat having been made in good faith, at a reasonable rate, with a party who held a possession apparently fair, under a bill of lading authorizing a re-shipment. The bad faith of the master of the first boat should not deprive the owners of the second boat of the remuneration due for their labour.

Where an agent with whom merchandize had been deposited, disobeys the private instructions of his principal, by shipping it contrary to the orders of the latter, a third person who acted in good faith and in confidence in a contract made as to the merchandize, and possession transferred by the agent, will not be permitted to suffer. Where one of two innocent persons must suffer, he ought to do so who has placed his property in the hands of a careless agent, rather than one who acts in good faith and on his confidence in what the agent has done.

Where a bill of lading stipulates for the privilege of re-shipment, a second carrier to whom the merchandize is transferred will have a lien on the property for his freight. He is not the mere agent of the first carrier.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.*  
*Elmore and W. W. King*, for the appellant, contended that the second

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carrier was the mere agent of the first, citing 19 Wend. 329, 534. 25 Wend. 660. *C. M. Randall*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The evidence in this case shows that the plaintiff had a quantity of oats at Brandenburg, a town on the Ohio below Louisville. They were in charge of *Gallagher*, a merchant of that place, who was authorized to ship the oats to New Orleans, when a written order to that effect from *Davenport*, the plaintiff's agent at Louisville, should be presented to him. The river was low at the time, and freights were unusually high. The captain of the steamer *Western* was at Louisville, and heard of a sudden rise in the river through travellers who had come down the river. He knew this would reduce the price of freights. He arrived at Brandenburg before the intelligence of the rise in the river had been received; and induced *Gallagher* to ship the oats on his vessel, by untruly representing that the plaintiff's agent at Louisville had verbally authorized him to get the oats at the freight of fifty cents per sack to New Orleans. A bill of lading was given by the *Western*, contracting to carry and deliver the oats at New Orleans to the plaintiff. In the body of the bill of lading was inserted the clause, "with the privilege of re-shipping." The *Western* not making the trip to New Orleans, but proceeding to St. Louis, re-shipped the oats at the mouth of the Ohio, on board the steamer *New World*, of which the defendant was master. This second bill of lading was to deliver the oats at New Orleans, at a freight of twenty-two cents per sack, to one *Fleming*, then the clerk of the *Western*, and who came to New Orleans in the *New World*. The only reason for this arrangement was that the captain of the *New World* was unable to advance the *Western's* share of the freight.

When the oats arrived at New Orleans, the plaintiff demanded them of the master of the *New World*, who refused to deliver them without the payment of freight. The plaintiff then brought the present action to recover them. The defendant reconvened and demanded the amount of his freight. The judgment of the lower court was against the plaintiff, and in favor of the defendant for \$382 86, the amount of his freight at twenty-two cents per sack. The plaintiff appealed.

As the contract for the transportation of the oats from Cairo to New Orleans was made by the defendant in good faith, at a reasonable rate, within the limit of the total freight originally stipulated, and with a party who held a possession apparently fair, under a bill of lading authorizing a re-shipment, we think the defendant should not be deprived of a remuneration for his labor, by reason of the bad faith of the *Western's* captain.

*Gallagher* had been entrusted with the possession of the oats by *Walker*. He was the agent to ship them to New Orleans; and although he disobeyed instructions, a third person who has acted in good faith upon the confidence of a contract made and a possession transferred by him, must not be permitted to suffer. We see no reason for distinguishing this case in principle from the case where a factor sells goods for a less price than his commission directs. In such cases the factor acts without authority, yet the sale nevertheless binds his principal. The buyer is not affected by the private order or direction with which he is unacquainted. The owner must take care whom he employs. Where one of two innocent persons is to suffer, he ought to suffer who has placed his property in the hands of a careless agent, rather than those who act in good faith upon the confidence of what the agent has done. If the public are to be affected by undisclosed breaches of duty of this sort, or secret equi-

ties existing against a party holding a possession apparently fair, and in the usual course of business, commerce would be seriously injured.

It may be conceded for the purposes of our present inquiry, that the Western's owner would be entitled to no freight at all. But the shipper gave up the possession under a contract which contemplated the employment of a new carrier, and thus the captain of the Western was clothed, as regards third persons, with authority, to do what he has done.

It is said that the second carrier was the mere agent of the first. The authorities relied on are cases where the owner sought to make the first carrier liable for goods which, under his contract, he undertook to deliver at a certain point, though in reality only performing a part of the transportation himself. See 19 Wendell, 329, 534. 25 Wendell, 660. But we find nothing in those cases establishing the principles that in case of a contract, made as this was, with privilege of re-shipment, the second carrier would not have a lien for his remuneration.

It must be observed that the freight from Cairo claimed by the defendant fell within the amount stipulated for the whole route. See the authorities quoted in Russell on Factors, p. 78. Story on Agency, 443, 388.

The plaintiff complains that the judgment did not in terms give him a judgment for the oats. The judgment may be properly interpreted with reference to the pleadings and proceedings in the cause. The plaintiff had the oats sequestered, and his prayer was that they be delivered to him. The defendant in his answer pleaded that he had a privilege upon the oats for his freight at twenty-two cents a sack, and that the plaintiff was bound to pay him the amount before he could recover them. Upon the filing of this answer, the plaintiff, "on suggesting to the court that the defendant claims but \$382 26, as a lien upon the oats sequestered in this case, and upon it appearing that the defendant has not applied to bond the same," had an order to bond the oats, upon giving security in the sum of \$500. In obedience to this order, the sheriff delivered the oats to the plaintiff, taking from him a bond for \$500, conditioned that the plaintiff should not send the property out of the jurisdiction of the court, and that he would faithfully present the same in case he should be decreed to restore the same to the sheriff or defendant, and would satisfy such judgment as should be rendered in the suit.

A judgment ought, if possible, to put at rest the issues between the parties, and close the door to further litigation. Although the judgment might have been expressed in more formal terms, we consider it, viewed as a whole and with reference to the pleadings and proceedings in the cause, as substantially closing the contest between the parties; leaving the plaintiff in possession of the oats, but decreeing him to pay the defendant his freight, for which payment the bond stands as security. Upon making that payment the rights of the defendant will be satisfied, and the plaintiff exposed to no further responsibility or litigation.

*Judgment affirmed.*

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### O'REILLY v. OAKLEY.

Decision in *O'Reilly v. McLeod*, 2 An. 146, affirmed.

One who sees the owners of a tract of land for compensation for work done on a levée, which proves to have been of no use whatever to the proprietor, must establish that the work was

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done by virtue of and in accordance with the law, and the regulations of the police jury. The word *levée* has a technical meaning fixed by the stat. of 7 February, 1829, and one claiming remuneration for constructing a *levée*, where there has been no adjudication to him, nor acceptance of the work by the inspector, and it is shown that the proprietor has not benefited by it, must show that the work was a *levée* within the meaning of that statute.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preston*, for the plaintiff. *Clarke, Micou and Van Dalsen*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiff claims \$1,685 for work done and materials furnished in making a *levée*, a road, ditches and bridges, on a tract of land belonging to the defendant. The defence is a general denial. The District Court sustained the claim, and the defendant appealed.

On the trial of the cause, the plaintiff offered in evidence a paper purporting to be an account of day's work laid out upon the defendant's *levée*. He also offered in evidence various written depositions to show the value of the work done, and of the materials furnished by him; to the admission of all of which the defendant objected, because the plaintiff had declared upon an adjudication by the inspector of roads and *levées*, and could not give evidence of the value of the work and materials. The court admitted the evidence, and the defendant took a bill of exceptions. The allegations of the petition are in the alternative, and the judge did not err in admitting the evidence. It comes properly under the allegation that the work was required by the police regulations and indispensable to the preservation of the land of the defendant.

In the case against *McLeod*, 2 An. 147, we reaffirmed the doctrine established in the case of *Police Jury v. Hampton*, 5 Mart. N. S. 392. We held that a party who has made a *levée* on another man's land may recover, even without a contract, if his work was necessary, and has been beneficial to the owner of the land.

We adhere to these decisions; but this case presents a different state of facts. Here the inspector refused to accept the *levée* made by the plaintiff. As soon as the water rose after its completion, it passed over it; it broke in many places, and was of no use or benefit whatever to the defendant. Under these circumstances, before the plaintiff can recover, he must make good the allegation of his petition, that the work was done in pursuance and by virtue of, and in accordance with, the law, and the rules and regulations of the police jury. It is proved that he had to make a new *levée* on all the front of the land but eight arpents. He must show affirmatively either that the dimensions and direction of the *levée* he made, were given to him by the inspector, or that he complied in making it with the act of 1829 concerning roads and *levées*. He must make the same proof in relation to the roads, ditches and bridges. The record contains no evidence in relation to these facts; but, on the contrary, the inspector declares that the work was done contrary to his orders, and not in conformity with law. It is evident that if the requisitions of the act of 1829 had been followed, the levee, when finished, would have been one foot higher than the highest water previously known, and that the rise which destroyed it could not have gone over it, it having been only a few inches higher than the water of the previous years. It is also in evidence that logs were left in the foundation of the *levée*, and this is assigned as one of the reasons why it did not stand.

The District Court considers it proved that the defendant promised to pay

the plaintiff his bill for the work, if he would make some deduction, and views this as a recognition of an obligation to pay something. The evidence of this fact was taken under commission, and is not satisfactory to us. The witness says, in his direct examination, that he heard the defendant say, in Thibodeauxville, that he would settle with the plaintiff and pay him for making the levée, if he would make some deduction. On the cross-examination he states that he was alone with the defendant when that declaration was made; that the plaintiff was not there; that no account was exhibited, and that he did not know the amount claimed; he assigns no motive for that declaration to him, but repeats that the defendant said he would pay, if the plaintiff made a liberal deduction. This witness has no knowledge of the account of which he speaks, and his testimony on other facts satisfies us that he is not worthy of credit. The plaintiff had originally claimed in this suit \$5,000 damages, alleged to have been sustained by him, in consequence of the breaking of the plaintiff's levées. On this part of the case, which has since been abandoned, the same witness swore that the damages sustained by the plaintiff exceeded \$5,000. But when made to state those damages in detail he said that, but for the crevasse, the plaintiff would have made 2,000 barrels of corn, worth \$1,500, and specified other damages amounting to a few hundred dollars more; thus reducing the loss to one-third of the amount originally sworn to. But this is not all. It is proved that the plaintiff had but a small quantity of cleared land, that the only portion he cultivated was his garden, and that he could not have made a crop of corn that year, because he had no enclosure in the month of April, when his land was overflowed.

There is no doubt that the defendant was guilty of negligence in not repairing his levées; this omission may have subjected him to damages; but it cannot dispense the plaintiff from making out a clear case before he can recover. The word *levée* has a technical meaning fixed by the act of 1829, and the party claiming remuneration for constructing a levée, where there is no adjudication, where the acceptance of the inspector is not produced, and where it is shown that the work has not benefitted the owner of the land, must show that this work was a levée, within the intent and meaning of that act. The plaintiff having failed to do so, must be non-suited.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment against the plaintiff as in cases of non-suit, with costs in both courts.

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### HENDERSON et al. v. BLANCHARD.

Where the term of payment of the price of land is uncertain and dependent upon the will and acts of the vendor, the debtor is not in default until notice is given him of the expiration of the term; and interest *ex mora* can only be recovered from the date of such notice.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* Henderson, one of the plaintiffs, *pro se.* Cohen, on the same side. *Dufour*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. This suit was brought in June, 1847, upon the defendant's written promise to pay the sum of \$400, being a part of the price of a tract of land at Pass Christian, sold by *Heirne*, acting as the agent of *Eduard Living-*

O'REILLY  
v.  
OAKLEY.



HENDERSON  
v.  
BLANCHARD.

*ston.* By the written agreement the defendant declared that he had paid only a portion of the purchase money, to wit, \$200; and that he was ready and willing to pay the remainder, to wit, \$400, "as soon as the said sale will be approved by said *Livingston*, and the title to said property, which is now called in question, shall be found good and valid."

*Livingston*, who then lived in New York, upon being informed by *Heirne* of the sale, wrote a letter to him approving it, in 1836. The title to the land was affirmed by act of Congress in 1842, in favor of the grantee *Pellerin*, under whom *Livingston* held; and a patent was issued in 1843 in favor of the heirs and assigns of *Pellerin*.

The district judge gave judgment in favor of the plaintiffs, with interest from 1842. From this judgment the defendant has appealed; and the only particular in which he complains of the judgment, is the allowance of interest from that date. He contends that notice should have been given that the conditions had been complied with, and that interest could only run from the day of such notice. No notice appears to have been given to the defendant of *Livingston's* ratification, anterior to the institution of this suit.

By the contract the defendant's promise was conditional. He was not to pay until *Livingston* approved the act of his agent. A term of payment was, therefore, given, the duration of which was uncertain, and was dependent upon the will and act of the vendor. When a term of payment is given, the interest can only begin to run from the end of that time. Civil Code, 2532. The general rule is that, upon the expiration of that term the debtor must be put *in mora*. Ib. 1932. But this general rule is subject to exception. "When the sum is due for property yielding a revenue (*qui produisent des fruits ou revenus*) interest is due from the time the principal is payable, without demand." Ib. 1933, 2531. Such being the general rule, and such the exception, can the present case be considered as fairly falling within the exception?

Exceptions, as they derogate from the general law, should be strictly construed. Where the term is certain, the debtor is guilty of neglect if he does not pay at the expiration of the term. He knows the term, and it is his own fault if he does not pay. But when the term is uncertain, and depends upon the will and act of the creditor, there is no neglect upon the debtor's part until notice be given to him.

It is, therefore, decreed, that the judgment of the District Court be so amended as that the interest run only from the 9th June, 1847 [the day of judicial demand]; and that so amended it be affirmed, the plaintiffs paying the costs of this appeal.

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### MARCHESSEAU v. CHAFFEE et al.

To entitle a purchaser of a boat load of coal to recover damages of his vendor for a breach of contract, where it is shown that the latter had subsequently sold and delivered the coal to a third person for immediate use, proof of tender of the price is not required; such a tender would have been a vain thing.

In actions for damages for breaches of contract, the market value at the time of the breach, where there is a market value, is the measure of damages; the party being entitled to recover advances made and expenses incurred by him under, or on account of, the contract and, in certain cases, interest

In an action for the breach of a contract of sale for a cargo of coal, sold for a certain price, to be delivered to the purchaser at a certain place, at the expense and risk of the vendor, but resold the next day by the vendor to a third person for the same price, which was shown to have been the market price, the latter agreeing to take the cargo at the place at which it was lying at the time of the first and second sales, the first purchaser can only recover as damages the expense of transporting the coal from the place at which it was sold to the place at which it was to have been delivered to him, and the value of the risk incurred in its transportation.

MARCHESSAU  
v.  
CHAFFEE.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Buisson*, for the appellant. *Greiner and Durell*, for the defendants. The judgment of the court was pronounced by

ROST, J. This is an action of damages for the breach of a contract for the sale of a boat-load of coal, measuring about two thousand barrels. The defendants filed a general denial, and averred that they had not been put in default. There was judgment in their favor, and the plaintiff appealed.

We are of opinion that the contract alleged in the petition is proved by competent evidence, and that, after the defendants had sold and delivered the coal to another person, who bought it for immediate use, the plaintiff would have done a vain thing in tendering the price. *Garcia v. Champomier*, 8 La. 519.

The only inquiry which this case presents is, the amount of damages sustained. The plaintiff had purchased the coal at fifty cents per barrel; the boat was then lying some distance above this city, and was to be landed the next day, in front of St. Louis street, at the expense and risk of the vendors. On the day following this sale, the defendants sold at the same price to *Ornard*, who took the boat where it was, and had it towed down to the wharf of his refinery, at his expense and risk. This was the day of the breach of the contract.

In actions of damages for breach of contract, we have adopted the rule that the market value at the time of the breach, when there is a market value, is the measure of damages: the party claiming damages being farther entitled to recover the advances made and expense incurred by him under, or on account of, the contract, and in certain cases interest. *Porter v. Barrow*, 3d An. 140.

In this case the coal was sold for the price the plaintiff had agreed to give the day before, and we are satisfied that the price obtained was the market value. The only gain made by the defendants in the second sale consisted in delivering the boat where it lay, instead of incurring the expense and risk of landing it opposite St. Louis street. For the amount of that expense, and the value of that risk, the plaintiff would be entitled to a judgment, if he had proved them; but, as he has failed to do so, he can only recover nominal damages.

It is, therefore, ordered that the judgment in this case be reversed, and that the plaintiff recover of the defendants one dollar damages, with costs in both courts.

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### SUCCESSION OF MCKINNEY.

The widow, who is tutrix of the minor heirs, is entitled to the administration of the succession of her husband, in preference to a person not shown to have been a creditor, though the application of the former was not made until more than ten days had elapsed from the advertizement of the first application. C. C. 1035, 1037. Arts. 1111 of the Civil Code, and 370 of the Code of Practice, requiring oppositions to applications for letters of administration to be filed within ten days after the publication of notice, relate to the appointment

SUCCESSION  
OF  
McKINNEY.

of curators of vacant successions; and cannot be considered as controlling the order of preference established for the appointment of administrators.

**A** PPEAL from the District Court of Jefferson, *Clarke, J. Marks*, for the appellant. *Mott*, for *Erwin*. *Micou*, for the administratrix. The judgment of the court was pronounced by

KING, J. *Mayer* applied, on the 29th of February, 1848, for the administration of the succession of *James McKinney*, deceased, averring that he was a creditor, and notice of his application was published in a newspaper, on the 4th of March following. *Erwin* and *Ridgely* also claimed the administration, on the ground that they were creditors of the succession. On the 18th of March, more than ten days after the advertizement of *Mayer's* application, *Mrs. McKinney*, the widow of the deceased, and tutrix of his children, filed an opposition, and claimed the administration for herself, asserting her superior right as widow and tutrix. Her claim was sustained, and *Mayer* has appealed.

The district judge did not, in our opinion, err. *Mayer* has not shown that he was a creditor, and rests his claim exclusively upon the priority of his application, and upon the neglect of *Mrs. McKinney* to present her opposition within the delay of ten days.

The Code designates the persons who are to be preferred in the appointment of administrators of beneficiary successions. Preference is to be given to the beneficiary heir, if he be present and of age, over any other person. If the beneficiary heirs be minors, the preference is to be given to their tutors. Civil Code, arts. 1035, 1037. This preference may be claimed as long as the appointment has not been confirmed on an earlier applicant. Articles 1111 of the Civil Code, and 970 of the Code of Practice, relied on by the appellant, and which require oppositions to applications for letters of administration to be filed within ten days after the publication of notice, are found in the chapters of those Codes which relate more particularly to the appointment of curators of vacant successions. It is true that those articles have been held to apply to the appointment of administrators, so far as to require the publication of notice. But they cannot be considered as controlling the order of preference established in appointing administrators, nor as limiting absolutely the time within which the preference may be claimed. In the case of *Hook v. Richardson*, 4 La. 570, it was held, that "the heirs present have a preference in the administration of the estate over any other person; and if a curator be unadvisedly appointed, his powers cease when they present themselves and demand it." It is contended by the appellee, and we think with reason, that if the legal preference could be enforced after the appointment of an administrator, *a fortiori* must it be recognized before such an appointment has been made.

*Judgment affirmed.*

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## THE STATE v. SUMMERS.

A verdict will not be set aside, on the ground that the jury, while deliberating, conversed with a deputy sheriff who sat at the same table with them at supper, where they were kept together during the adjournment of the court, and the conversation does not relate to the trial, and could not have produced any effect on their decision. Where jurors have not been permitted to separate, their verdict will not be set aside unless the ten-

dency of the irregularity complained of has been to influence their deliberations. The mere presence of an officer could have no influence on them.

A jury, kept together during the adjournment of the court, are entitled to necessary refreshments, if furnished at their own expense.

Where, at the instance of the counsel for the accused, the judge, in his charge to the jury, states his opinion as to the credibility of a witness, and, on the return of the jury into court for further instructions, repeats what he originally stated respecting the witness, the accused cannot object to it.

A prisoner is entitled to the assistance of his counsel in exercising his right of challenge.

A verdict cannot be sustained where this right is refused.

STATE  
v.  
SUMNER.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *J. M. Wolfe* and *Holland*, for the appellant. The judgment of the court was pronounced by

*KING, J.* The accused was convicted of robbery, and moved for a new trial on various grounds. The motion was overruled, and he has appealed.

The irregularities which it is contended vitiate the verdict are: 1st. That the jury, while deliberating, conversed with the deputy sheriff, who sat at the same table with them during the supper hour.

2d. That the jury, during their retirement, conversed with *Lugenbull*, another deputy.

3d. When the jury returned into court for further instructions, the judge expressed to them his opinion that the testimony of the witness *Fitzwilliams*, was worthy of credit.

4th. That the prisoner was denied the aid of his counsel, in exercising his right of peremptory challenge.

I. It appears that the jury were at first unable to agree, and the hour being late, the court, about eight o'clock in the evening, adjourned over to the following morning. The jury were committed to the charge of a deputy sheriff, and were provided with refreshments under the directions of the sheriff. The deputy sat at the table with them, and partook of the meal, but held no conversation with them. The only conversation which he is shown to have held with any of the jurors at any time, related to the opening of a door in order to establish a communication with an adjoining gallery. When jurors have not been permitted to separate, their verdict will not be set aside, unless the tendency of the irregularity complained of has been to influence their deliberations. *Wharton's C. L. 644. 8 Rob. 590.* The jury were entitled to necessary refreshments, if furnished at their own expense; and it is not perceived how their verdict could have been influenced by the mere presence of the officer during their meal.

It has been urged in argument, as a further irregularity, that the jury were furnished with wine at supper. This was not one of the grounds presented for a new trial in the court below, and, even if it were entitled to weight under the loose evidence in the record, could not be considered here.

II. The second ground is not supported by the evidence. The testimony of *Lugenbull* leaves it doubtful whether the question which he answered, was asked by the juror while the latter was sitting on the trial of this case. But, if the fact had been established, it would not affect the result. The question and answer had no relation to the trial, were unimportant in themselves, and could not have influenced the verdict.

III. The judge was requested by the prisoner's counsel, while delivering his charge to the jury, to state his opinion in relation to the credibility of the witness *Fitzwilliams*, and complied with the request. When the jury, after hav-

STATE  
v.  
SUMMERS.

ing deliberated for some time, returned into court for further instructions, the judge repeated what he had originally stated respecting the testimony of this witness. Of this the accused cannot complain.

IV. In relation to the last ground, it has not been shown that the accused was denied the assistance of his counsel in exercising his right of challenge. On the contrary, the judge, in assigning his reasons for overruling the notice for a new trial, states that the practice of his court accords this right to parties accused. We may add that the prisoner has an undoubted right to this aid, and that no verdict could be sustained in a case where it was refused.

The motion for a new trial was, in our opinion, properly overruled.

*Judgment affirmed.*

### MCDONOGH v. NUGENT.

Decisions in *Plique v. Bellomé*, 2 Ann. 293, and in *McDonogh v. Derbigny*, 2 Ann. 956, affirmed.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Gritot* and *Roselius*, for the appellant. *Warfield* and *Rand*, for the defendant. The judgment of the court was pronounced by

**KING, J.** The plaintiff instituted an action for the recovery of \$800, alleged to be due by the defendant for the rent of a building, and caused the furniture in the leased premises to be provisionally seized. On a rule taken by the defendant, the provisional seizure was set aside by the district judge, and from the judgment on the rule the plaintiff has appealed.

There is no evidence in the record of the value of the furniture seized, and nothing to shew that the matter in contest comes within the jurisdiction of this court. We cannot, on the present appeal, consider the principal action, and the amount which it involves. Our inquiries must be confined to the proceedings on the incidental demand, in which the judgment appealed from was rendered. In that proceeding it was incumbent on the appellant to show that the amount in controversy brought it within the jurisdiction of this court. The case is not to be distinguished in principle from that of *Plique v. Bellomé*, 2 Ann. 293. See also *McDonogh v. Derbigny*, Ib. 956.

*Appeal dismissed.*

### SUCCESSION OF MANN.

Where, after judgment on an opposition to an executor's account, the account is homologated and payment ordered to be made accordingly, the opponent cannot, by a rule taken on the executors to show cause why he should not pay over the balance ascertained by the judgment to be due him, and why, on failure to produce his bank-book, he should not be condemned to pay the succession interest at twenty per cent a year on each of the sums belonging to the succession received by him from the dates of their receipt, recover interest at twenty per cent for any period anterior to the date of the judgement of homologation by which he is concluded.

Interest cannot be sued for distinctly from the principal. It makes no difference that the interest claimed be allowed as a measure of damages, as in case of interest at twenty per cent a year allowed to successions where the executors fails to deposit money in bank as required by law. Interest *ex mora* is, in all cases, the measure of damages.

SUCCESSION  
OF  
MANN.

**A** PPEAL from the Second District Court of New Orleans, *Canon, J. Hoffman* and *Halsey*, for the appellant. *Roselius*, contrâ. The judgment of the court was pronounced by

*Rost, J. Black*, who purchased the succession of *Arthur Mann* from the only heir, presented a petition to the District Court, praying that *Martin*, as executor of the last will of *Arthur Mann*, might be cited, and ordered to render an account of his administration of the succession. The petitioner also prayed for general relief. In conformity with the order of the court made on this petition *Martin* filed his account, to which *Black* made, at different times, three several oppositions, praying in each for some modifications of the account, and also for general relief. Upon the issue thus formed a judgment was rendered sustaining some of the oppositions, dismissing the others, homologating the account as amended, and ordering payment to be made accordingly. This judgment was rendered on the 18th July, 1848, and appears to have been satisfactory to both parties, as neither has appealed.

On the 6th October, 1848, *Black* took a rule on *Martin* to produce in court the bank-book, if any he had, which he had kept as executor, with any of the banks of this State, at New Orleans, allowing interest on deposits, and to show the condition of his account as executor as aforesaid; to show cause why he should not pay over to *Black*, the balance ascertained by the judgment; and why, in default of producing a bank-book, he should not be condemned to pay to the succession twenty per cent per annum interest, on each of the sums belonging to the succession, which he has received, from the respective dates of the receipts of said sums, under the act of 1837.

*Martin* excepted to the rule that, the whole matter relative to his responsibility as executor had been finally determined and settled by the judgment of the court on the oppositions filed to the account rendered by him; and pleaded said judgment in bar of *Black's* claim. The District Court sustained the exception for all claims of *Black* anterior to the date of the judgment; but adjudged the executor to pay ten per cent per annum on the balance of the account from that date. *Black* has appealed.

One of the first questions settled in the jurisprudence of Louisiana is, that interest cannot be sued for distinctly from the principal. *Faurie v. Pilot*, 2 Mart. 83. It is urged that the interest in this case is not given as interest, but as a measure of damages. We do not apprehend the distinction. Interest *ex mora* is in all cases a measure of damages; the rate of it, in particular cases, cannot affect the principal.

The plaintiff in the rule should have claimed the interest in his opposition to the account, and might have done so under his prayer for general relief. We are of opinion that, after the final judgment of homologation, the claim now made by him can only be sustained, from and after the date of the judgment. *McMicken v. Millaudon*, 2 La. 181. *Campbell v. Briggs*, 3 Rob. 111.

It is admitted that the amount of the judgment is not deposited in bank, and there is nothing in the record to show that it has been lawfully withdrawn. *Black* is, therefore, entitled to the interest he claims, from the date of the homologation, and, in this respect, the judgment must be amended.

SUCCESSION  
OF  
MANN.

It is, therefore, ordered, that the judgment in this case be amended, so as to allow interest at the rate of twenty per cent per annum, instead of ten per cent, on the sum of \$1,639 17, from the 18th July, 1848, till paid. It is further ordered, that the judgment as amended be affirmed, with costs.

### DUCOURNAU et al v. LEVISTONES.

Decision in *Ducourneau v. Levistones*, 2 An. 245, affirmed.

Where a suspensive appeal has been dismissed on account of the failure to file the record within three judicial days after the return day, the appellant cannot afterwards take a devolutive appeal from the same judgment.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Buisson*, for the plaintiffs. *Collens*, for the appellant. The judgment of the court was pronounced by

**SLIDELL, J.** The Code of Practice is positive that if the appellant does not file the transcript seasonably, the appeal shall be considered as abandoned, and the appellant shall not be afterwards allowed to renew it. C. P. 594. 4 La. 41.

The omission is attributed by the appellant to the fault of his attorney. We stated, on a former occasion, that this could not be recognized as a ground of relief. It is unnecessary to repeat the reasons then given. See same case 3 An. p. 245. *Appeal dismissed.*

### DE BEN v. GERARD.

The powers vested in police juries and other political corporations must be exercised by ordinances general in their operation.

Though the stat. of 28 March, 1840, creating a police jury for that part of the parish of Orleans on the right bank of the river, should be considered as vesting the police jury with power to regulate the proportions, directions and repairs of the levées, and so far repealing the stat. of 7 February, 1829, concerning roads and levées, the last act remains in force and must govern the rights of the reparian proprietors until the powers confirmed by the stat. of 1840 have been legally exercised.

The object of sec. 16 of the stat. of 28 March, 1840, creating a police jury for that part of the parish of Orleans on the right bank of the river, was merely to make the owners of back lots contribute with the front proprietors to the construction and repairs of levées, which afford them all equal protection. It provides at whose expense they shall be made and repaired, but is silent as to the manner of making them, and as to the place whence the necessary materials are to be taken.

The property of the banks of rivers is in those who possess the adjacent lands, and they have a right to prevent an unlawful use of them by the agents of the public.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Roselius*, for the plaintiff. *Warfield* and *Rand*, for the appellant. The judgment of the court was pronounced by

**ROST, J.** The plaintiff, who is owner of a front lot in the unincorporated village of Tunisburg, enjoined the syndic of the police jury from taking, near the water's edge in front of his levée, the earth necessary to repair the levée

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of another lot in the same village. The police jury intervened as defendants, averred their right to use the river bank in front of the plaintiff's lot for any purposes of public utility, and to take materials there to erect or repair any levée within the village. They alleged that this right was worth more than \$300 to them. The District Court perpetuated the injunction, and the defendants appealed.

The motion to dismiss the appeal on the ground of want of jurisdiction cannot be sustained. The evidence adduced by the appellants satisfies us of their right to be heard in this court.

On the merits, we are of opinion that there is no error in the judgment. The act of 1829, concerning roads and levées, prescribes the manner in which levées are to be made and repaired, and designates the place where the earth for those purposes is to be taken. It is alleged that the act of 1840, creating a police jury for that part of the parish of Orleans situated on the right bank of the river, and defining its powers, has vested the police jury with full power and authority to regulate the proportion, direction and repairs of levées, and that it abrogates the act of 1829. We are not prepared to say that this is a correct interpretation of that act; but, if it should be, it is not shown that the police jury have exercised that power and authority. The powers vested in political corporations must be exercised by ordinances general in their operation. *First Municipality v. Blineau*, 3 An. 688. Until the power claimed by the defendants has been legally exercised, the general law of 1829, concerning roads and levées, remains in full force.

The object of the 16th section of the act of 1840, was merely to make the owners of back lots contribute with the front proprietors to the construction and repairs of levées, which afford them all equal protection. It provides at whose expense the levées shall be made and repaired, but is silent as to the manner of making them, and as to the place where the materials required for that purpose are to be taken. The property of the river banks is in those who possess the adjacent lands, and they have the right to prevent an unlawful use of them by the agents of the public.

We are of opinion that this controversy, as it is presented to us, is to be determined by the provisions of the act of 1829, and that, under those provisions, the injunction was properly granted.

*Judgment affirmed.*

### THE STATE v. BANTON.

Section 3 of the statute of 6 March, 1819, punishing any person "who shall inveigle, steal, or carry away any slave, so that the owner of such slave shall be deprived of the use and benefit of such slave", creates several offences, and a separate indictment for any one of them would be good; but they may all be charged conjunctively in one count. *Per Curiam*: When a statute enumerates several offences connected with the same transaction, or the intent necessary to constitute such offences, disjunctively, they may all be alleged cumulatively in one count, and in that event must be charged with the indictment conjunctively. A *nolle prosequi* may be entered upon one count of an indictment, and a judgment be claimed on the remaining counts, even after a general verdict.

**A**PPPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *R. H. Barker*, for the appellant. The judgment of the court was pronounced by

DR BEN  
v.  
GERARD.

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STATE  
v.  
BARTON.

KING, J. The indictment in this case is founded on the 3d section of the act of 1819. Acts p. 62. The first count charges, that the defendant aided a slave in running away from his master; the second, that, he "did inveigle, steal, and carry away a slave named *Joe*, the property of *Phillip Moore*, so that the owner of said slave, the said *Phillip Moore*, was then and there deprived of the use and benefit of his said slave" &c. The jury found a general verdict of guilty. After the conviction, the Attorney General entered a *nolle prosequi* on the first count. Sentence was pronounced on the conviction on the second count, and the accused has appealed.

It is urged: 1st. That the indictment is defective, because several distinct substantive offences are joined in the same count. 2d. That the entry of a *nolle prosequi* on the first count after conviction, was equivalent to an abandonment of the entire prosecution, and entitles the prisoner to his discharge.

The statute on which the prosecution is founded declares several offences. Among the number are, *stealing*, inveigling, and carrying away a slave, so that the owner is deprived of the use of the slave. There can be no question that, under the statute, a separate indictment for any one of those offences would be good. 1 East. C. L. 402.

The general rule is, as stated by the counsel for the accused, that several distinct offences cannot be included in one count of an indictment; it is subject, however, to numerous exceptions. The rule appears to be well established in relation to penal statutes that, when the statute enumerates several offences connected with the same transaction, or the intent necessary to constitute such offences, disjunctively, they may all be alleged cumulatively in one count, and in that event must be charged in the indictment conjunctively. Wharton, Crim. Law, p. 81, 98. Starkie, Criminal Pleadings, 271.

In the case of *Rex v. Middlehurst*, 1 Burr. 399, the words of the statute on which the proceedings was based, were, "assisting in removing or concealing." It was contended that two distinct offences were created, and this appears to have been conceded. Lord Mansfield said: "Upon indictments it has been so determined that an alternative charge is not good, as "forged or caused to be forged", though *one only* need be proved if laid conjunctively, as "forged and caused to be forged."

In the case of *The State v. Price*, 6 Halstead, p. 203, an indictment charging that the defendant "did burn and cause to be burned" a barn &c., was held to be good, under a statute declaring it criminal "to burn or cause to be burned." Yet two distinct offences are enumerated in the act, and were charged in the indictment. So an indictment was held good which alleged that the defendant, "set up and kept a gaming table, and induced others to bet at it;" although under the statute on which the indictment was founded, *setting up a gaming table* was an indictable offence, and the keeping of such a table and inducing any person to bet upon it, another." *Hinkle v. Comm.* 4 Dana's R. 518.

Under a statute against "shooting with intent to maim, disfigure, disable, or kill," it was held that the act of shooting was properly charged with all the intents in one count. *Angel v. Comm.* 2d Va. Cases, 231. In that case it was said that "to shoot only with intent to "disfigure," is certainly punishable under this statute; so with intent to maim, with intent to disable, and with intent to kill; and if an unlawful shooting with either of the intents is prohibited by the statute, it necessarily follows that an unlawful shooting with all of these intents is likewise prohibited. The indictment then which charges all these intents must be sufficient under the statute, and it can-

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BANTON.

not be demurred to on that account. The authorities in support of the position are numerous." See also 2 Va. Cases, 256. Under the statute declaring it criminal to "falsely make, forge, counterfeit or alter," the indictment may charge all the offences in one count—"did falsely make, forge and counterfeit." 2 Starkie, Criminal Pleadings, 489.

Starkie, in his work on Criminal Pleading, p. 271, says that: "It is the usual practice to allege offences cumulatively, both at common law and under the description contained in penal statutes; as, that the defendant published and caused to be published a certain libel;" that he "forged and caused to be forged" &c.

Under the authorities, which it is needless further to multiply, we think that the charges of "stealing, inveigling, and carrying away," were properly laid in one count.

The second point presented is elaborately examined in the cases of the *Comm. v. Tuck*, 20 Pick. 364, and the *Comm. v. Briggs*, 7 Pick. p. 177, and the reasoning and authorities upon which they maintain the right of the Attorney General to enter a *nolle prosequi* upon one count of an indictment, and to claim judgment upon the remaining counts, after a general verdict, appear to us conclusive.

*Judgment affirmed.*

### MCDONOGH v. DE GRUYS et al.

It is the duty of a court having cognizance of a suit on the subject of limits to comply with the provisions of arts. 829, 837 of the Civil Code. No judgment can be pronounced, until the report of the surveyor appointed to inspect the premises, and the plans made by him in execution of the order of survey, have been brought into court.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. Hennen*, for the appellant. *L. Janin*, for the defendants. The judgment of the court was pronounced by

ROST, J. This purports to be an action of boundary. The plaintiff sets forth his title to a tract of land alleged to adjoin lands of the original defendant, *De Gruys*, and prays that the boundaries of their respective possessions may be established. The defendant answered alleging title in himself, and denying the title or possession of the plaintiff to any land adjoining his own. After issue joined, the plaintiff obtained an order of survey, which has never been executed. *De Gruys* having subsequently died, his legal representatives were made parties defendants; they filed an answer denying generally the allegations of the petition, but acknowledging that their land was bounded on both sides by lands of the plaintiff. Their prayer was that the suit be dismissed, or if there should be judgment in favor of the plaintiff, that he be adjudged to pay them \$10,000, the alleged value of their improvements.

The parties went to trial, without having caused their boundaries to be ascertained and marked by a sworn surveyor, and the court, finding itself unable to arrive at any satisfactory conclusion in relation to them, dismissed the action. The court, at the same time, decreed the defendants to be the owners of the land described in their answer. The plaintiff appealed.

When limits are fixed judicially, it must be done by a sworn surveyor of the

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DE GRUYE. State. C. C. 829. It is the duty of the judge who has cognizance of suits on the subject of limits, to appoint surveyors to inspect the premises in question; the court, on the report, ought to decide according to the titles of the parties and the plans which shall be presented to the court. Art. 837 C. C. These dispositions of the Code have not been complied with. It was the duty of the judge to require the report of the surveyor, and he should not have passed upon the case until the plans made by that officer in execution of the order of survey, were brought into court.

The court further erred in passing definitively upon the title of the defendants. This was not asked by either party, and the uncertainty which prevented the court from determining the boundaries of the plaintiff's land must also exist in relation to that of the defendants' possessions. This case must be remanded.

It is, therefore, ordered that the judgment in this case be reversed, and the case remanded for further proceedings in conformity with the opinion of the court; the defendants and appellees paying the costs of this appeal.

### MEDD v. DOWNING et al.

Money deposited with a sheriff, under art. 3034 of the Civil Code, as security for the release of property provisionally seized; must be restored to the depositor on the dissolution of the seizure.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Hiestand*, for the appellant. No counsel appeared for the defendants. The judgment of the court was pronounced by

EUSTIS, C. J. On the 12th of July, 1847, the plaintiff deposited with the defendant *Dewees*, sheriff of the parish of Jefferson, \$325, as security for the release of a raft of timber, which the sheriff had seized in the suit of *Downing v. Russell*, which sum was to be restored to him on his giving security according to law, and took from him a written receipt to that effect. The writ of provisional seizure under which the raft had been taken was, on motion, set aside, and the raft released from seizure. *Medd*, the plaintiff, had intervened in the suit of *Downing v. Russell*, and claimed the raft as his property; but, it being released, there was nothing on which his intervention in that suit could rest, and it was accordingly dismissed. Judgment was rendered in that suit for \$250 and costs, in favor of the plaintiff *Downing*.

*Medd* has sued to recover from *Dewees* the amount deposited with him as a security for the value of the raft. The district judge dismissed the plaintiff's petition on the ground that he had failed to show a compliance with the condition of giving security as stated in the receipt, and the plaintiff has appealed.

The amount deposited by the plaintiff in the hands of the sheriff to effect the release of the seizure of the raft must be considered as received and retained by that officer, under article 3034 of the Code, which authorizes the receipt of money by public officers on deposit, in lieu of security, in cases in which security is required to be given. The property having been released from seizure, the sheriff can no more keep the amount deposited than he could recover in an action against the plaintiff had the latter given his forthcoming bond for the raft, instead of having made the deposit.

The defendant *Deweese* alleges as a ground of defence, that he has seized the money under a *feri facias* issued in the suit against *Russell*; but there is no evidence showing that the money was *Russell's*. There is nothing in the bill of exceptions taken to the exclusion of evidence by the district judge.

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It is, therefore, adjudged that the judgment appealed from be reversed, and that the plaintiff recover from the defendant, *Deweese*, the amount of the deposit made with him as sheriff of the parish of Jefferson, to wit, the sum of \$325, with interest from the judicial demand, and costs in both courts.

### BOTTS v. COCHRANE.

The liability of the owners of any ship, vessel, or other water craft to the owner of any slave illegally carried from one part of the State to another, under the stat. of 26 March, 1835, only exists where the master of the vessel would be subject to the pains and penalties of the stat. of 13 February, 1816.

The duty, imposed by the stat. of 13 February, 1816, on the master of a vessel who discovers a fugitive slave on board, to land him at the nearest place, is substantially obeyed by landing him at the nearest place where he can be landed with reasonable facility, and in such a mode as may be best calculated to ensure his safe keeping. It would be unreasonable to require a captain to stop in the night, and to go on shore in search for a justice or other inhabitant, when, by proceeding on his voyage till daylight he could reach a principal town of the State, where he might provide for the safety of the slave, and give publicity to his elopement.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan*, J. *Preston*, for the appellant. *Michel* and *Burns*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. A slave belonging to the plaintiff ran away from him, and secreted himself on board of the defendant's steamer, then about leaving the city on a voyage up the river. The boat left New Orleans in the afternoon, and sometime in the evening the slave was discovered by the mate. Early the next morning the boat arrived at Baton Rouge, when the slave, who had been confined during the whole night, was placed in charge of the wharf-master, who had him put in jail there, and advertized as a runaway. All the intermediate jails were passed in the night time. The plaintiff recovered his slave about four months afterwards, receiving him from the jailor at Baton Rouge; and brought this action to recover from the defendant the expenses incurred in searching for and regaining possession of the slave, and the value of the slave's time at two dollars per day.

This claim the plaintiff attempts to maintain under the statutes of 1816 and 1835. The act of 1816 imposed, by its first section, the penalty of imprisonment at hard labor for a term not exceeding seven years and not less than three, and a liability for all damages to the proprietor, upon masters of vessels who should, without the consent of the owner, carry a slave out of the State, or receive him on board with that intent, or conceal him for the purpose of enabling him to make his escape. By the fifth section it was enacted that, if a master should discover a slave concealed on board his vessel, it should be his duty, if still in the river, or within the limits of the State, to land the slave at the nearest place—*au lieu le plus prochain*, and there to deliver him to any

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judge, justice of the peace, sheriff, jailor, or, in defect thereof, to any inhabitant, that he may be sent to his master; and that any master refusing or neglecting to perform what was required in the section should be liable to the same punishment, and the damages mentioned in the first section. By the act of 1835, the liability in damages was extended to the owner of the vessel, for the acts and omissions of the master contemplated in the act of 1816.

As the liability of the owner only accrues in cases where the master would be subjected to the pains and penalties of the act of 1816, we will examine the effect of the statute, as though the steamer's captain were under prosecution, under the fifth section of the act of 1816. If he could not be subjected to imprisonment at hard labor for a term of three years, the vessel's owner cannot be made liable in this suit.

The statute is highly penal, and is not to be harshly construed. It must receive a reasonable construction, such as will accord with the intention of the legislature. That intention was the protection of the slave owner, and the accomplishment of the restoration of fugitives. The injunction upon the master of the vessel who discovers a fugitive slave on board to land him at the nearest place, is, we think, substantially obeyed by landing him at the nearest place where it can be done with reasonable facility, and in such mode as may be best calculated to ensure his safe custody. It seems to us it would be unreasonable to require the captain to stop in the night, no matter where it might be, and go on shore to search for a justice or an inhabitant, when, by proceeding on his voyage until day-light, he would reach a principal town of the State, where he would be sure to find the means of providing for the safe keeping of the slave, and giving publicity to his elopement. We cannot resist the conviction that the captain acted in good faith, and, in the exercise of a sound judgment, under the circumstances, for the protection of the owner. No jury, we conceive, would find a verdict upon an indictment against a captain upon such facts; nor do we think a court could properly instruct them that it would be their duty so to find.

*Judgment affirmed.*

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### DAWSON et al. v. HOLBERT, Tutrix, et al.

A donation *inter vivos*, with a reservation of the usufruct to the donor, being in violation of a prohibitory law (C. C. 1520) is null, and cannot be protected by the prescription of one year.

The prescription of one year established by art. 1989 of the Civil Code, does not apply to an action to have a simulated sale decreed to be such.

Where a third person purchases property at a sale under execution, with money furnished in whole or in part by the insolvent debtor, under an arrangement with the latter that the property shall be held by the purchaser as a trustee for the benefit of a child of the debtor, the title of the debtor will have been divested, but in fraud of his creditors. The transaction will be subject to the prescription of one year, established by art. 1989, commencing, not from the date of the sheriff's deed, but from the time when the complaining creditor obtained a judgment against the debtor.

Though a plaintiff is authorized, under art. 719 C. P., to issue execution against the surety on a twelve-months' bond, "in the same manner as on a final judgment", and is thus clothed with one of the rights of a judgment creditor of the surety, he is not really such within the meaning of art. 1989.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Horner*, for the appellants. *Collens*, for the defendants. The judgment of the court was pronounced by

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**SLIDELL, J.** The petitioners allege that they obtained a judgment in 1840, against *Summers*; that property of *Summers* was sold, in 1841, under a *fiert facias*; that *Summers* became the purchaser, and gave *James Holbert* as his surety in the twelve-months' bond; that, in November, 1841, *Holbert* made a donation *inter vivos* of a house and lot to his minor daughter *Julia*, reserving to himself, during his life time, the usufruct of the property; that the donation is null from its nature, and is also fraudulent and ineffectual against creditors by reason of the insolvency of *Holbert* at the time; that afterwards *Holbert* consented to a sale of the same property under an execution against him at the suit of another creditor, and bought it in by the interposition of *Daniel Phillips*. The prayer is that, the donation and the apparent title of *Phillips* be declared null, and that the property be subjected to the payment of the plaintiff's judgment. The tutrix of the minor and *Phillips* first pleaded the general issue, and subsequently the prescription of one year. Upon the plea of prescription the court below gave judgment in favor of the defendants; and the plaintiffs have appealed.

As to the donation, we have no hesitation in considering it a nullity. Our Code declares that, "the donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself." This is a salutary departure from the Napoléon Code, by which a donor was permitted to reserve the usufruct to himself. The change was dictated by sound considerations of public policy. In the language of the jurisconsults who prepared the amendments to our Code of 1808, (which conformed to the Napoléon Code, see Code of 1808, p. 220, art. 50. Nap. Code 949), "the reservation of the usufruct in favor of the donor would produce the disadvantage of concealing from the eyes of the public the change of property which had taken place. He who wishes to enjoy, during his life, a piece of property which he destines for another, can give it by last will; and it is not easy to perceive the use of a donation *inter vivos* with reserve of usufruct." See amendments to Civil Code, p. 203. The donation was, therefore, in violation of a prohibitory law; and such a nullity was certainly not covered by the prescription of one year.

Dismissing therefore entirely the act of donation, we proceed to examine the question of prescription with reference to the title of *Phillips* under the sheriff's deed, which was made to him in 1843, under execution at the suit of *Maher* against *Holbert*.

*Phillips* did not take possession under this deed. *Holbert* remained in possession of the property until his death, which occurred in 1847; and his widow, the tutrix of the minor, has occupied it since. *Phillips*, whose answers to interrogatories have been offered by the plaintiffs, says that *Holbert* ceased to have any interest in the property after the sheriff's sale; that it was sold to him by the sheriff upon a twelve-months' bond, and that he paid this bond at its maturity; that a portion of the money, with which he paid, he received from friends of the minor, and a portion from *Holbert*, who stated at the time of handing him the money that it did not belong to him. *Phillips* further declared that he had made the purchase at the request of the friends of the child, in order to save it for her, and not in any manner to benefit *Holbert*; and that he held himself ready at any moment to pass a title to the child.

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There are three views in which this purchase may be regarded. *First*, As a mere purchase by *Phillips*, as the friend and agent of *Holbert*, with his monies and for his benefit; *Phillips* taking the paper title in his own name, but leaving the possession in *Holbert*, and standing ready to make him the paper title when he should require it. In other words as a mere simulation. *Second*, As an agreement by which *Holbert* intended that the property should inure to the benefit of his child, through *Phillips* as a trustee for her, he furnishing the money, or a portion of the money, to *Phillips* to pay the sheriff. *Third*, As a purchase by *Phillips* in good faith, for the benefit of the minor, with monies furnished not by *Holbert*, but by the friends of the minor.

Under the first hypothesis we consider the prescription of one year inapplicable. The form of the conveyance would be immaterial. A sale effected for such a purpose through the sheriff, so far as *Holbert* was concerned, would stand on the same footing as though he had made a conventional transfer in the ordinary form of a deed of sale. The case therefore would be one of simulation, and under the principles announced in *Cammack v. Watson*, and repeated in *Wright v. Chambliss*, *Linderman v. Theobalds*, and *Hobgood v. Brown*, (1 An. 132, 262; 2 An. 323, 913.) article 1989 is inapplicable.

Under the second hypothesis, the title of *Holbert* would have been really divested but in fraud of his creditors. The transaction would therefore be subject to the prescription of one year, dating however, not from the date of the sheriff's deed, but from the time the complaining creditor obtained a judgment against the debtor. To ascertain whether in the case supposed prescription has accrued, we must determine the question which has been much discussed by counsel, whether the plaintiffs are to be considered as the judgment creditors of *Holbert*, at a period more than a year antecedent to the institution of this suit. We have stated that *Holbert* became, in 1841, the surety of *Summers* in a twelve-months' bond given to the plaintiffs. The defendants contend that when this bond matured the plaintiffs occupied the attitude of judgment creditors of *Holbert*, because they had a right under the 719th article of the Code of Practice, to issue execution against *Holbert* the surety "in the same manner as on a final judgment." But though the holder of the bond is thus clothed with one of the rights of a judgment creditor, we cannot therefore consider him as really a judgment creditor. When the Code speaks, in article 1967, of creditors whose "debts are liquidated by a judgment", and, in article 1989, of a creditor who "has obtained judgment against the debtor," we must consider the language as used in its ordinary sense. We therefore conclude that the case cannot be properly determined upon the plea of prescription; and this brings us to the consideration of the third proposition, namely, whether *Phillips* is to be considered a purchaser in good faith for the benefit of the minor, with monies furnished not by *Holbert*, but by the friends of the minor.

If we could bring our minds to a conclusion upon this point in favor of the defendants, there would be an end of the case. But upon this point we are not satisfied, and have determined to remand the case for further investigation. Our reasons for doing so will be briefly stated. In the first place, we have not the benefit of the opinion of the district judge. It is possible that he may have entertained doubts as to the *bona fides* of the transaction, since he did not decide the case upon that ground, but upon the plea of prescription. In the next place the retention of possession by *Holbert* was an unfavorable circumstance, which raised the presumption of simulation. C. C. 2456. It threw the burden upon the defendants, and called for satisfactory proof of the validity of

the sale, and that the parties acted in good faith. *Phillips* acknowledges that a portion of the money to pay the twelve-months' bond, executed by him to the sheriff, was furnished by *Holbert*; and if *Holbert's* declaration at the time was true, that it was not his money, it would have been much more satisfactory if it had been shown from whom he got it. So also the silence of *Phillips* as to the names of the friends of the child who furnished him the rest of the money, is suspicious. Those friends might have been named, and then they could have been called to testify. On the other hand, it ~~must be~~ acknowledged that *Phillips* speaks very positively as to the absence of collusion with *Holbert*.

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Under all the circumstances of this case, which involves the whole fortune of the minor, we have deemed it the safest course to remand the cause for a new trial, believing that the good faith or dishonesty of the transaction can be more clearly ascertained by further evidence.

It is said in argument by the defendants' counsel that the plaintiffs are not entitled to prosecute this action, because they had not obtained a judgment against *Holbert* before the institution of the suit, and did not make his succession a party. The defendants pleaded no exception to that effect; but went to trial upon the merits and the plea of prescription. Moreover, it appears by evidence introduced without objection, that during the pendency of this cause the plaintiffs became parties to the probate proceedings in *Holbert's* succession, and were recognized as creditors of his estate.

It is, therefore, decreed that the judgment of the court below be reversed, that the plea of prescription be dismissed, and that this cause be remanded for a new trial, and for further proceedings according to law; the defendants paying the costs of this appeal.

### JACOB v. DAVIS.

A verbal agreement for the sale of land or slaves is not null. The defect of such a contract relates only to the proof; and if one of the parties acknowledges the agreement, or permits parol evidence of it to be given without opposition, it must be carried into effect.

**A**PPPEAL from the Second District Court of New Orleans, *Canon, J. Griffon*, for the appellant. *Moise and W. M. Randolph*, for the defendant. The judgment of the court was pronounced by

ROST, J. This suit is instituted to rescind the sale of a slave, on the ground that he was addicted to running away. It is alleged that he ran away within two months after the sale made of him by the defendant; that he had not been eight months in the State at that time; and that, under the act of 1834, the presumption is that he had that vice at the time of the sale. The answer is a general denial. There was judgment against the plaintiff, as in case of non-suit, and he appealed.

It is admitted that the slave was taken up on the 4th September, after running away, and having been absent four days. He must, therefore, have absented himself on the last day of August. The authentic bill of sale to the plaintiff bears date the 10th of July, 1847. But the plaintiff has proved by parol evidence that the contract between him and the defendant was made before that date, to wit, on the 27th June, 1847, and that the slave was then de-



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livered, and came on the plantation of the plaintiff, where he remained until he ran away.

This evidence contradicts the notarial act of sale, but as it was adduced by the plaintiff himself, he must take the consequences. Our predecessors have repeatedly decided that a verbal agreement for land or slaves, even under the provisions of our Codes, was not null and void. That the defect which such a contract presented, relates solely to the proof; and, if one of the parties acknowledges the agreement, or permits parole evidence to be given of it without opposition, it is the duty of courts of justice to carry it into effect. *Brown v. Frantum*, 6 La. 46.

We consider it proved, as the district judge did, that the sale and delivery took place on the 27th of June, and that the plaintiff has not brought himself within the provisions of the act of 1834.

The defendant has asked that the judgment be amended and made final in his favor. This application was not made in time, and cannot, therefore, be granted. Code of Practice, 890.

*Judgment affirmed.*

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#### CORDEVOLLE et al. v. REDON.

Where a lessee, who had bound himself not to sub-let any part of the premises for more than one year, sub-lets a part for nine months, covenanting to renew the lease on the same terms from year to year for the residue of his own term, the sub-lease is a violation of the prohibition, and will authorize the lessor to demand the rescission of the lease. C. C. 2696, 2700.

The prohibition to sub-let is always construed strictly against the lessee. Such a prohibition is not personal to the original lessor; but, in the absence of any stipulation to the contrary, the whole contract may be assigned by the lessor to a third person.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Bodin*, for the plaintiffs. *R. H. Barker*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The defendant, by his contract of lease, bound himself not to sub-lease any part of the premises for more than one year, without the consent of the lessor. He made a lease to *Brown & Brooks* of a portion of the premises for nine months, (taking monthly notes for the rent,) with a covenant to renew the lease on the same terms and conditions from year to year for the residue of his own term, which then had about three years to run. It does not appear that this sub-lease had been rescinded before the institution of this suit. By art. 2696 of our Code, the landlord may, by the terms of the lease, forbid the lessee to under-lease. "The interdiction," says the Code, "may be for the whole, or for a part; and this clause is always strictly construed—*cette clause est toujours de rigueur*." The language is taken literally from the Napoléon Code; and the interpretation which it appears to have uniformly received in France, so far as our researches have extended, is that the prohibition must be construed strictly against the lessee. See *Troplong, Contrat de Louage*, § 138. *Duranton*, vol. 7, § 84. *Rogron*, 1717.

Although the lease to *Brown & Brooks* was not, in direct terms, a lease for more than one year, it was so substantially. So far as *Redon* was concerned he certainly placed that portion of the premises out of his control for more than

one year; nor is there any expression in the lease indicating that the renewal was to be at the discretion or option of the lessees. The fair interpretation of the lease would seem to make the renewal obligatory on both parties, although new acts would be necessary to be done under the covenant, such as giving notes for the rent of the new terms.

The sub-lease was in violation of the prohibitory clause, and this violation gave the plaintiff a right to demand a resolution of the lease. Such is the right reciprocally given to landlord and tenant, if either violate the contract. Civil Code, 2700. If there be any hardship it is of the party's own making. Having assented to the prohibition, he has made the contract the law between himself and his lessor, and we are not permitted to enquire into the motive of the prohibition, nor whether its breach will injure the plaintiffs.

The lease was made by the City Bank to Redon, and the plaintiffs subsequently bought the property from the lessors. By so doing they succeeded to the rights of the bank under the contract. We do not consider the reservation as to consent personal to the bank. In the absence of a stipulation to the contrary, the entire contract was assignable by the lessor.

*Judgment affirmed.*

### ARNOULT v. DESCHAPELLES.

In an action against the master to recover the value of a slave belonging to plaintiff killed by a slave of defendant, proof that the slave had been convicted of the killing and had been sentenced to imprisonment at hard labor for life, and that a certain sum had been paid for him by the State to defendant, will not relieve the defendant from liability for his offence. The slave having ceased to belong to defendant, he cannot make an abandonment of him; but as the slave is represented by the sum received from the State, he may exonerate himself by paying over that amount.

Decision in *Hynson v. Meuvillon*, 2 An. 798, affirmed.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Roselius*, for the plaintiff. *Burthe*, for the appellant. The judgment of the court was pronounced by

**ROST, J.** This is an appeal from a judgment in favor of the plaintiff in an action instituted to recover the value of the slave *Henry*, formerly belonging to the plaintiff, and alleged to have been killed by the slave *Lewis*, belonging to the defendant.

Our attention has first been drawn to a bill of exceptions taken to the opinion of the district judge, admitting in evidence the record of the conviction of *Lewis* to prove *rem ipsam*. But as this evidence is not copied in the transcript, and the plaintiff's counsel do not rely upon it, it is unnecessary to pass upon its admissibility.

It is proved that the defendant asked his slave *Lewis*, after *Henry* had received the wounds of which he died, "Why did you stab that boy?" and that *Lewis* answered: "Because I found him in my cabin, with my wife."

The district judge was of opinion that the question put by the defendant presupposes the knowledge in him that the act had been committed by *Lewis*, and gave judgment against him, without taking into consideration the answer of *Lewis*, or his declarations and those of *Henry*, found in the record. Al-

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though the evidence is not of the most satisfactory character, yet as it produced conviction on the mind of the district judge, and as that conviction is not manifestly erroneous, we do not feel at liberty to reverse his opinion.

The death of the slave *Henry* and his value, and the ownership by the defendant of the slave *Lewis*, are admitted. But the defendant contends that he is not liable in damages, and is dispensed from making the abandonment authorized by art. 181 of the Civil Code, because the slave *Lewis* has been convicted of the crime alleged, on his own declarations and those of *Henry*, and sentenced to hard-labor for life, in consequence of which he has ceased to belong to the defendant, who has received from the State \$300 for him.

The question, whether under art. 181 of the Civil Code, a party situated as the defendant is, can liberate himself from the payment of greater damages by abandoning the slave who caused them, while he is undergoing the legal punishment of the offence, came before us in the case of *Hynson v. Mewillon*, 2 An. 798, and was decided affirmatively. We held in that case, that a slave confined at hard-labor for a term of years might be abandoned. In this case, the slave convicted has ceased to belong to the defendant, and he cannot make an abandonment of him; but that slave is represented by the sum received from the State; and, under the spirit and intent of the article of the Code, the defendant may exonerate himself by paying over this sum to the plaintiff, within three days after this decree becomes final. This appears to us a fair and legal inference, and a proper extension of the *actio noxalis*. In this respect the judgment must be amended.

It is, therefore, ordered that the judgment of the court below be amended, so that if, within three days after this decree becomes final, the defendant pay the plaintiff the sum of \$300, the judgment about to be rendered shall be entered satisfied, except for costs. It is further ordered, that the judgment as amended, be affirmed; the defendant and appellant paying the costs of the District Court; those of this appeal to be paid by the plaintiff and appellee.

### VIONET v. THE FIRST MUNICIPALITY.

The power to relieve the indigent sick, especially in times of epidemic disease, and to provide for the poor who are unable to labor, is inherent in every municipal corporation.

The power to relieve the indigent sick, and to provide for the poor who are unable to labor, is conferred on the municipal authorities of New Orleans, by stats. of 14 March, 1816, s. 1, and 17 February, 1821, s. 2.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Foulhouze*, for the appellant, contended that the power to employ physicians was conferred on the authorities of the city of New Orleans by the stats. of 14 March, 1816, s. 1, and 17 February, 1821, s. 2. The power is inherent in every municipal corporation. *Merlin, Jurisp.*, vol. 36, p. 207. 2 *Kent's Comm.* pp. 296—7. *Milne v. Davidson*, 5 Mart. N. S., 409. *Preaux*, for the defendants. The judgment of the court was pronounced by

**EUSTIS, C. J.** The plaintiff, who is a practising physician, sues the First Municipality for the sum of \$550, for professional services rendered the indigent sick of the Fifth District of the municipality, during the epidemic of 1847.

The council passed an ordinance, on the 9th of August of that year, authorizing the aldermen of each district, to select for their respective districts, two physicians and two apothecaries, who were to give aid and provide medicines for the indigent sick during the prevalence of the epidemic. This ordinance was afterwards repealed, the repeal to take effect from the 1st Nov. then next ensuing.

The plaintiff was selected by the aldermen of the district under this resolution, and performed his duty in attending to the sick. The council, by a resolution, allowed to each of the physicians thus employed the sum of \$200 as compensation for their services, which they accepted, with the exception of the plaintiff. The district judge gave the plaintiff judgment for this sum only, and he has appealed.

The district judge was satisfied from the evidence that the plaintiff was entitled for his services to a larger sum than that given by the judgment, but was not satisfied that the government of the municipality had the power to authorize the employment of the plaintiff, or to appropriate the corporate funds to the payment of his claims.

The statutes referred to by the counsel for the plaintiff we think give full power to the mayor and council of the municipalities to relieve the indigent sick. It is a constituent power, we believe, of municipal corporations to provide for the poor who are unable to labor, and, during the prevalence of an epidemic, there is none the exercise of which is more imperative than that of furnishing medical assistance to those who are unable to procure it themselves.

The provision of hospitals for the indigent sick is within the police power of cities. The power has been exercised by the former corporation of New Orleans, and we believe is admitted by all writers of authority to be an essential part of municipal government. 1 Blackstone Com. 131, 360. Droit Public de Domat, lib. 1, tit. 16, sec. 1, s. 6.

The mode of assistance adopted by the council, of taking care of the indigent sick where they are found, is certainly not less legal than congregating them in hospitals.

Finding nothing in the employment of the plaintiff for his professional services to which any legal objection exists, the question before us is as to the amount due him. It would be unjust to graduate the compensation due to the plaintiff by the allowance to the other physicians, unless it were ascertained that the allowance was adequate to the services rendered. That it was is disproved by the testimony of a respectable medical gentleman. Besides the difference of the extent and population of the districts, and the condition of the streets in the suburban parts, make a great difference in the time and labor required from a physician attending the sick.

The plaintiff was employed without any contract or understanding as to his compensation. He is entitled to recover from the defendant what his services are proved to have been worth. The evidence shows they were worth the sum of \$550.

The judgment of the District Court is therefore reversed, and judgment rendered for the plaintiff against the defendants, for \$550, with interest from judicial demand, and costs of suit in both courts.

## THE CITIZENS' BANK v. DENNISTOUN et al.

A transaction entered into on documents which are subsequently discovered to be false, is null *in toto*. In such a case it is immaterial to enquire to what extent those false documents may have been the moving or determining cause of the transaction. C. C. 3048.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* The facts of this case are stated at length in the opinion of the court *infra*. *Grima, Pierce and Roselius*, for the plaintiffs. *Briggs and Grymes*, for the appellants. The judgment of the court was pronounced by

*Eustris, C. J.* The defendants, together with several other merchants of the city, had claimed a large quantity of cotton, which had been purchased by *Vincent Nollé*, in 1839. Their claims were contested by the plaintiffs, who asserted a superior right on the same cotton, which was then held under judicial process. After ineffectual attempts to release the cotton from the custody of the law the parties entered into a compromise. This compromise is in writing, and was concluded and signed on the 8th of May, 1839.

By its conditions the suits were to be discontinued at the costs of the parties; all ulterior claims resulting from the transactions which were the subject of the arrangement were waived; the rights of the bank to all advances made on the cotton were recognized; the bank was to discount the drafts of *Nollé* for the amount due by him to each of the parties, which drafts were to be endorsed by the party with a waiver of protest and notice; the cotton was to be delivered to the bank to be forwarded to its destination; the debt thus contracted to the bank was to be paid out of the proceeds of the cotton; and the parties bound themselves to make good any deficiency, each in his due proportion. The cotton was delivered to the bank accordingly; the drafts were taken, and the money paid.

The present action, which was instituted in 1842, is to recover from the defendants the sum of \$121,512 53, alleged to be the balance, including interest, due on advances under this arrangement, after crediting them with the proceeds of the cotton, less the advances made by the bank to *Nollé*. The cause was tried before a special jury of merchants on two occasions without the jury in either case agreeing in a verdict, and was finally determined under an agreement of counsel submitting it to the judge of the Fifth District Court of New Orleans, who had presided at the jury trials. He rendered judgment against the defendants for \$65,004 45, with interest; and from this judgment the present appeal is taken by the defendants. The bank in its answer on the appeal asks for a change in the judgment, giving the whole amount claimed in the petition.

The defendants admit the advance to them of \$92,000 on *Nollé's* drafts. They allege that they were induced to sign the compromise and relinquish their claim upon the cotton by fraudulent representations made to them, that the cotton upon which they had a lien was pledged to the bank, when in fact the cotton was not pledged to the bank. They claim credit for the proceeds of one thousand bales of cotton, being a part of two thousand four hundred and seventy-one bales bought by *Nollé* from *Yeatman & Co.*, and designated as the cotton *per John Randolph*.

The truth or falsity of the representations under which the defendants en-

tered into the compromise by which their claims on the cotton were relinquish- CITIZENS' BANK  
ed, rests upon the fact of the acts of pledge in the books of the bank having DENNISTOUN-  
been executed at the time they bear date, or afterwards, and antedated. The district judge did not decide the case upon this contested question of fact, but settled the accounts between the parties independent of the compromise, allowing the defendants credit for the amount of their advance on the one thousand bales of cotton, on the ground that the bank had no legal possession of that parcel, which was essential to the validity of the pledge.

The facts in relation to these one thousand bales appear to be as follows: On the 14th of April, 1839, *Nollé* bought of *Yeatman & Co.*, two thousand four hundred and seventy-one bales of cotton. The purchase was to be considered as for cash, but no money was paid, and the payments were fixed at six different terms, from the 20th of April to the 15th of May, both inclusive. The cotton was not delivered. *Nollé's* broker procured from the cotton press into which the cotton was taken from the landing, three receipts bearing date severally the 16, 17, and 18th of April. These receipts, two of which signed by the pressman, and one by his clerk with his authority, acknowledged to have received, on the days of the date, from *Nollé*, the number of bales specified and marked, and to hold them subject to the order of the cashier of the Citizens' Bank. At all of these dates there is no evidence that the quantity of cotton specified in the receipts was in the press, nor was it weighed or marked. The receipts were all false; and were procured by *Nollé's* broker, and furnished by the pressman, without any privity or consent on the part of *Yeatman & Co.*, to whom the cotton belonged exclusively, to the knowledge of both broker and pressman.

The account sales, giving the weight and total price of the cotton, furnished to *Yeatman* on the 21st, bears date the 20th, and of the same date is a receipt of the pressman acknowledging to have received the cotton for account of *Yeatman*, which puts this fact beyond all question.

On the 20th, *Yeatman & Co.* gave an order on the press for one thousand bales of the cotton, and called the same day to receive the first payment, \$25,000. There appears to have been some difficulty or delay on the part of *Nollé*, but the defendants gave *Yeatman* a check for \$25,000 in favor of *Nollé*, which was endorsed by him and paid on the 22d. This sum was advanced on the order given by *Yeatman & Co.*, was in favor of *Nollé* or his order, and bore the endorsement of *Nollé*. On the 25th the suit of the defendants against *Nollé* was commenced, for the sequestration of the cotton on which they had made advances. It is not proved that the order was notified to the pressman before monday, the 22d, and the plaintiffs contend that it was not notified until after this sequestration. *Yeatman* had, on the 23d, commenced proceedings against the whole lot of cotton, and was made defendant, with *Nollé*, in the suit of the *Dennistouns*. In both of these suits the bank intervened, and claimed the cotton. The intervention in the *Dennistoun* suit had for its object the setting aside of the sequestration as to two thousand and thirty-seven bales, the sequestrations having covered the whole lot *per John Randolph*. The petition based the rights of the parties upon advances made to *Nollé* on the cotton, and its being in their possession, under certain acts of pledge executed by *Nollé*.

This statement places before us the antagonist pretensions of the plaintiffs and defendants on this cotton, which was delivered to the former under the compromise of which we have spoken; and we purpose first to examine the

CITIZENS' BANK correctness of the decision of the district judge as to the respective rights of  
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The petition of the bank charges the advances to have been made to *Nollé* on his two drafts, dated the 17th of April on *Baring, Brothers & Co.*, forming an aggregate of £16,800, to secure the acceptance of which *Nollé* delivered the cotton, and pledged the same to the bank, *as will appear by the deeds of pledge themselves subscribed by said Nollé*, and that the advance made by the *Dennistouns* on the 20th, was three days after the cotton was delivered and pledged as aforesaid to the bank.

It can hardly be urged that the possession of *Yeatman & Co.*, who were the owners of the cotton, could be affected by the acts of *Nollé*, or of his agents. The rights of the bank are derived from *Nollé*, and he having no claims on the cotton until it was paid for or until the vendors chose to give him the control of it by delivery, it follows, as a matter of course, that, by virtue of the receipts above mentioned, the bank had in no sense possession of the cotton.

The argument of the counsel for the plaintiffs is, that *Nollé* acquired the possession under the order of the 20th from *Yeatman & Co.*, and that this possession inured to the benefit of the plaintiffs, in as much as the defendants never gave notice of the order to the pressman until after the sequestration, which took place on the 25th and the receipts in terms acknowledge the possession of the bank. The order is to this effect:

"Messrs. Tilghman & Barnes: Deliver *Vincent Nollé*, or order, one thousand bales of cotton out of the lot of two thousand four hundred and seventy-one bales, received *per steamboat John Randolph*, and oblige.

(Signed) "YEATMAN & Co."

(Endorsed) "VINCENT NOLTE."

"New Orleans, 20 April, 1848."

But if notice to the pressman of the order was necessary to give the *Dennistouns* possession of the cotton, it was equally necessary for *Nollé* to give notice in order to give him possession of it. No such notice was given by *Nollé*, and, according to the argument, the possession remained in *Yeatman & Co.* up to the time of the sequestration by the *Dennistouns*, in which the pressman were made defendants. The possession of the original owner was uninterrupted and not changed until that event, and the bank never had possession until the cotton was given up under the compromise.

The right of the *Dennistouns* to hold the cotton adversely to the bank under article 3214 of the Civil Code being thus established by the advance and the possession, we find that this right was abandoned in favor of the bank under the compromise. The questions raised as to the validity of the compromise must necessarily be determined; for, if it be valid, the bank retains its paramount claims secured by it; and if the compromise be set aside, the parties must be restored to their original rights as they existed previous to and independent of it.

The article of our Code just quoted, which provides for the security of the commission agent or consignee for his advances on goods consigned to him, requires that the goods should be delivered to him, or, in a case of this kind, to use the words of the article, that they be at his disposal in his stores or in a public warehouse.

Questions concerning the symbolical delivery of merchandize are so important in their consequences upon the operations of commerce that, inasmuch as there is no necessity for it, we must not be understood as deciding that under

the evidence in this case the delivery was perfect to either of the parties. The bank hold under the possession of the *Dennistouns*, and have no rights under *Yeatman* adverse to the defendants. They took the cotton, without any subrogation, under the compromise, to the claims of *Yeatman* against the defendants; and they cannot now contest the possession under which they hold, without showing a superior right to it anterior to the compromise. It, therefore, does not become necessary to determine on the perfectness of the possession by the defendants, under the order for the one thousand bales, previous to the sequestration, under which the whole lot was taken and delivered to the bank.

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It will be seen by the petition of intervention of the bank in the sequestration suit of the *Dennistouns* that its claims to the cotton was based upon the delivery and pledge of the two thousand and thirty-seven bales, "as will appear by the deeds of pledge themselves, subscribed by said *Nollé*," to use the language of the petition. These acts of pledge, which are before us in the originals, purport to have been executed, on the 15th, 16th and 17th April, respectively.

*Nollé*, who was examined as a witness under a commission in the city of Trieste, states that these acts of pledge were altogether an afterthought, and were all signed together at his rooms, on Sunday, the 21st, the day intervening between the advance of the \$2,500, on the 20th, by the *Dennistouns*, and the notice to the pressman on Monday, the 22d. As to this fact of the antedating of these acts, counter testimony has been offered. We have stated that this cause had been tried before two special juries without any result, and from the complexion of the whole evidence, we take it that this point was the obstacle. The district judge so considered it, and, under the view of all the difficulties which it presented, has given his opinion fully upon it, though he did not decide the case upon the point. Having presided at the two contested trials, and having heard the witnesses, some of whom were twice examined in open court, his opinion upon the issue of fact, whether the acts were antedated or executed at the time they purport to be, is entitled to great weight, and we should not be justified in overlooking it and acting on our own, unless that opinion was evidently erroneous.

The principal argument presented by the plaintiffs against the effect of *Nollé*'s evidence is that, he is unworthy of belief, in consequence of the frauds he committed in these transactions, and the levity and discreditable manner in which his testimony is delivered. Indeed the district judge states expressly that this evidence, taken by itself, would be unworthy of the slightest attention. An extract from his opinion will give his reasons not so much for believing *Nollé*, as for believing the fact of the pledges having been antedated to be as stated by the witness.

"In various other particulars, moreover, the evidence given by *Nollé* is directly contradicted by respectable witnesses. But it so happens that the portion of *Nollé*'s deposition which gives a date to the pledges of the cotton in question, different from the dates upon their face, is very remarkably corroborated by the appearance of the pledges themselves. They are not in the regular pledge book of the bank in the order of their dates, but are upon loose sheets of paper, wafered into another pledge book, which was not regularly opened until many months after the date which the pledges purport to bear. All the other pledges given to the bank by its customers are filled up in printed blank forms, bound up together in a book, and follow each other in regular rotation. The series of those printed pledges filled up and signed by the customers of the bank, is un-



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interrupted in this volume, before, at, and after the dates given to the pledges in question. Why, then, were those pledges not in their proper place in the volume? A plausible, and apparently the only plausible, answer is that furnished by *Nollé's* evidence, to wit, that the pledges in question were not executed at the bank where the book was kept, nor on a day when the bank was open for business, but were in reality executed at *Nollé's* lodgings, and on a Sunday. Besides this singular appearance of the instruments themselves, I cannot shut my eyes to the fact that *Nollé* did not alone sign them. They were signed by *Perrault*, the cashier, and by two witnesses, clerks of the bank. Why was not *Perrault* examined as a witness in this cause, to rebut *Nollé's* evidence on this point? One of the clerks has been examined, and his evidence does not contradict that of *Nollé* upon this point. He recollects signing papers at *Nollé's* rooms, but cannot say whether they were pledges or not. The witness recognizes his signature, but cannot say from his recollection at present, precisely where or when he signed. All is doubt and uncertainty. This uncertainty may very easily exist in the mind of a person who has had no other connection with an instrument than to attest the signature of a contracting party, especially after a lapse of many years; but I again must ask, why was not *Perrault* examined? His connection with the affair was too intimate to permit us to doubt that he has a recollection of it, and that he can give *Nollé's* story the most emphatic contradiction, if false. I do not, however, consider it necessary to decide this very difficult question of fact, upon which no less than two juries have hung already in the cause."

The force of this statement, it must be conceded, it is difficult to resist, and of its truth and accuracy we think there can be no doubt. In scrutinizing the conclusions which the district judge felt himself bound to adopt, we have carefully examined every well ascertained fact connected with this transaction in all its bearings and consequences, without having found any which are in conflict with that testified to by *Nollé*, of the antedating of the acts of pledge. No explanation is attempted to be given of the fact of the pledges not being in the regular books of the bank in the order in which the several dates would place them, and without such explanation upon what hypothesis can their being out of their proper place be accounted for, except on that which this testimony and the attending circumstances concur in establishing?

There are two additional facts which, in reference to this enquiry, may not be unimportant. On the trial of the rule in *Dennistown's* case, taken by the bank in order to bond the cotton, *Perrault*, the cashier, was examined as a witness for the bank, and makes no allusion to the acts of pledge although the petition of intervention, as we have seen, was based upon the acts of pledge. He says, "on being shown the two drafts marked G and H, they were paid to Mr. *Nollé* as an advance on the cotton pledged to the bank; previous to the money being advanced as above stated, the policies and receipts were transferred to the bank; in making the advance the bales were averaged as weighing four hundred and twenty pounds, without making any estimation of the actual weight; and to arrive at the amount the bank advanced, it was valued at ten cents; part of the cotton was shipped on the *Diadem*; witness cannot recollect whether the bank issued orders for the shipment of the cotton or not; but that he generally issues orders for such shipments."

A close examination of the acts of pledge in the book of the bank, has satisfied us that three at least, and in all probability four, of them were signed at

the same time. Ink of the same consistency and the same pen were evidently made use of by the person signing them, and his handwriting bears intrinsic signs of their being written at the same time and without interruption.

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The law on the subject of compromises has been properly stated by the counsel for the defendants. The provision of our Code that a compromise entered into on documents which have been since found to be false, is null *in toto*, applied to the facts disclosed and the judicial proceedings which the compromise was entered into in order to terminate, is fatal to its validity. To what extent these pledges may have been a moving or determining cause of the compromise, we do not think it material to inquire. The defendants, it is not proved, knew that the pledges were false and antedated. The law gives no effect to compromises on false documents, and hence the formal and positive enactment on the subject.

The counsel for the defendants contend that if the compromise be declared void, the defendants are entitled to the nett proceeds of the one thousand bales of cotton which the bank has received, instead of their advance of \$25,000 allowed by the district judge, and also to a credit for the commissions in Liverpool, which now stand in the account of the bank as a charge against them.

We must restore the defendants to the rights they had under their sequestration. If the bank took the cotton and sold it, it is but just that the proceeds received should be for account of those who had a superior right to it. The defendants have not asked to be credited with its value here, but are satisfied with the nett proceeds of the sale in Liverpool. The allowance of the nett proceeds of the one thousand bales appears to be a necessary result of the *statu quo*, to which our decision on the compromise restored both parties.

The evidence authorizes the allowance of the commissions, on the same principle. Had the cotton been left to its original destination under the consignment on which the advance was made, it would have gone to the defendants' house in Liverpool, and the commissions would thus have been saved to them.

The compromise fixed the rate of interest at seven per cent. Had it not been for the compromise there is no reason to believe that the defendants would have made the loan from the bank, and there is no ground on which a rate of interest higher than the legal rate can be allowed.

As the defendants have shown no legal ground on which the balance of the advance by the bank, after deducting the proceeds of the one thousand bales of cotton and the commissions on the sale, was retained, they must pay interest *ex mora* from the judicial demand. The proceeds of the cotton and commissions are to be calculated at the value of the pound sterling by the act of Congress of 1842.

It is, therefore, decreed that the judgment of the District Court be reversed; and it is ordered, that the plaintiffs recover from the defendants, *in solido*, the sum of \$44,133 43, with interest from judicial demand; the plaintiffs paying the costs of this appeal, and the defendants those of the District Court.\*

\* The counsel for the appellants prayed for a re-hearing, urging: That the source of the 3049th article of our Code is found in the law 42, title 4, of the 2d book of the Justinian Code, and reads as follows: "Si ex falsis instrumentis transactiones vel pactiones initæ fuerint, quamvis iurjurandum de his interpositum sit, etiam civiliter falso revelato, eas retractari præcipimus: ita demum, ut, si de pluribus causis vel capitulis eadem pactiones seu transactiones initæ fuerint, illa tantummodo causa vel pars retractetur, quæ ex falso instrumento composito convicta fuerit: aliis capitulis firmis manentibus: nisi forte etiam de eo, quod falsum dicitur, controversia orta decisa sopiatur."

Brunemann, in his commentary on this law, uses the following language: "Si quan-

**CITIZENS' BANK** do ex falsis instrumentis judicatum sententia lata retractatur, utique etiam transactio, quando scilicet falsis instrumentis persuasus quis transegit, retractari potest etiam si sit jurata. Sed id de iis capitibus tantum intelligendum, in quibus alter falsa instrumenta produxit, nisi sint connexa." Vol. 2, p. 130.

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Duaren, commenting on the title in the roman digest, De Transactionibus, says, at page 83 of his works: "Dolus etiam probandus est, quemadmodum metum probandum esse diximus. Non enim sufficit protestari, aut dicere coram magistratu se dolo adversarii inductum esse ad transigendum ut ipsa rescindatur transactio, sed eum probari oportet dolum. Et hoc generaliter verum est."

Godfred, in his note on the 42d law of the Code, remarks: "Jurata transactio eatenus rescinditur, quatenus prætextu falsorum instrumentorum facta est."

The modern writers are equally clear and unanimous on the subject. Article 3049 has been literally transcribed from the 2055th article of the Napoléon Code. Toullier states the rule thus: "Du reste, les transactions suivent la loi commune relativement à l'erreur de fait, qui les annule ainsi que les autres conventions, lorsqu'elle a été la cause principale du contrat. Les articles 2055 et 2056 en offrent des exemples." Vol. 6, no. 72.

It may, perhaps, be said, that the rule of the roman law has not been adopted in the modern Codes, without considerable modifications; and that the Louisiana Code formally and distinctly declares that "a compromise entered into on documents which have since been found false, is null *in toto*." Now in what does this rule differ from that of the roman law? Simply in this, that instead of annulling the compromise only so far as it was produced by documents which have since been discovered to have been forged, and maintaining it so far as it is unconnected with them, it is annulled *in toto*. The article of our Code has not subverted the whole doctrine on this subject, by providing that it is altogether immaterial whether the compromise was made in consequence of the forged instruments or not. The law does not deal in mere abstractions, and, therefore, it is of no importance whatever whether the acts of pledge in the present case were antedated or not, unless the defendants were induced thereby to propose and execute the compromise. The provision of the Code lays down the familiar rule that fraud taints and vitiates all contracts. What is the evident meaning and import of the words of the Code "on documents, &c."? No other than this, that the compromise must have been made in consequence of, and with reference to, documents which have since been discovered to be false or forged; in other words, that these must have been the principal, if not the sole, motive or inducement for making the compromise. In order to invalidate a compromise on the ground of fraud or error, the same rules of law apply which would govern with reference to any other contract. One of these rules is, that "fraud as applied to contracts, is the cause of an error bearing on a material part of the contract created or continued by artifice, with a design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other." C. C. art. 1841. The rule with regard to error is similar. C. C. art. 1835-6. We do not contend that, under art. 3049 of the Code, it is necessary to show that one of the parties was conscious of the falsity or forgery of the documents; for, even if both parties were ignorant of the fact, and acted in good faith, the compromise would nevertheless be null *in toto*. But on different grounds; if one of the parties was aware of the forgery, the contract would be annulled on the score of fraud; if not, on that of error.

Such was the view of the subject presented to the Council of State, by Bigot-Préameneu, when the 2055th article of the Napoléon Code was under discussion: "Il a toujours été de règle qu'une transaction faite sur le fondement de pièces alors regardées comme vraies, et qui ont ensuite été reconnues fausses, est nulle. Celui qui voudrait en profiter, serait coupable d'un délit, lors même que dans le temps du contrat il aurait ignoré que la pièce était fausse, s'il voulait encore en tirer avantage lorsque sa fausseté serait constatée."

Mais on avait, dans la loi romaine, tiré de ce principe une conséquence qu'il serait difficile d'accorder avec la nature des transactions et avec l'équité. On suppose dans cette loi que dans une transaction il peut se trouver plusieurs chefs qui soient indépendans, et auxquels la pièce fausse ne soit pas commune. On y décide que la transaction conserve sa force pour les chefs auxquels la pièce fausse ne s'applique pas.

Cette décision n'est point admise dans le projet de loi. On ne doit voir dans une transaction que des parties corrélatives; et lors même que les divers points sur lesquels on a traité sont indépendans quant à leur objet, il n'en est pas moins incertain, s'ils ont été indépendans quant à la volonté de contracter, et si les parties eussent traité séparément sur tous les points.

On eût moins risqué de s'écarter de l'équité, en décidant que celui contre lequel on se serait servi de la pièce fausse aurait l'option, ou de demander la nullité du contrat en entier, ou d'exiger qu'il fût maintenu quant aux objets étrangers à la pièce fausse; mais la règle générale que tout est corrélatif dans une transaction, est celle qui résulte de la nature de ce contrat; et ce qui n'y serait pas conforme ne peut être exigé par celui même contre lequel on s'est servi de la pièce fausse.

And in the report made by the tribune Albisson, on the same occasion, we read:

"Mais il est d'autres cas où elle est entièrement nulle, ou tout au moins sujette à re-

scision ; et ce sont ceux qui peuvent faire anéantir un jugement en dernier ressort, auquel *CITIZENS' BANK* l'article 2052 assimile la transaction.

Telle est, d'après la disposition de l'article 2055, la transaction faite sur pièces qui ont été depuis reconnues fausses. Dol d'une part, erreur de l'autre : un accord qui n'aurait pas d'autres éléments ne saurait subsister ; aussi le projet le déclare-t-il entièrement nul."

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Again the tribune Gillet said :

" Ainsi les jugements définitifs sont annulés lorsqu'il y a eu falsification des pièces, ou rétention malicieuse de celles qui pouvaient éclairer la décision : les mêmes circonstances doivent donc faire annuler la transaction."

We contend that, it is very material to inquire to what extent the pledges have been the moving or determining cause of the compromise. If the pledges exercised no material influence on the minds of the defendants in making the compromise, they cannot now claim its nullity because the pledges were antedated.

It is shown by the evidence introduced by the defendants themselves, before the Commercial Court, several days before the compromise was proposed by them, that they knew perfectly well that the cotton had not been delivered to the bank, and that, therefore, the acts of pledge were not worth the paper on which they were written. Possession is of the essence of the contract. C. C. art. 3119. As the pledges, then, were absolutely and radically null and void, for the want of delivery and possession of the cotton attempted to be covered by them, how can it be pretended that they could be rendered still more so by being antedated? No degree of nullity of a pledge is imaginable beyond that resulting from the absence of possession. The parties so understood it, for the compromise was not made on the pledges ; no mention of, or allusion to them, is made either in the propositions for a compromise, or in the contract itself.

*Re-hearing refused.*

### MICHOUD et al., Executors v. MARQUET et al.

Where part of a flock of sheep, purchased at a succession sale, die within three days thereafter of a disease proved to have been incurable, the vendor must bear the loss. C. C. 2508. In such a case the sale cannot be rescinded, but the price of the sheep which have died should be deducted from the price of the flock.

**A**PPPEAL from the District Court of Assumption, *Randall, J. Mathiat* and *Soulé*, for the appellants. *Hsley*, for the defendants. The judgment of the court was pronounced by

KING, J. A part of the consideration of the note sued upon in this action was a flock of sheep, of which thirty-eight are shown to have died within three days after the sale, of a disease which the witnesses say was incurable.\* The vendor must sustain the loss of those which perished. C. C. art. 2508. The witnesses state that the disease was contagious, and extended generally through the flock, but no other deaths are shown to have occurred. The judge should only have allowed a credit for \$49.40, the actual loss proved.

The judgment of the District Court is therefore reversed, and judgment rendered in favor of the plaintiffs, and against the defendants, *in solido*, for \$453 60, with eight per cent interest from the 4th of April, 1846, until paid ; the appellees paying the costs of this appeal, and the appellants those of the court below.

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\*The purchase was made at a sale of property belonging to the succession of *Girard. R.*

## MCAULEY v. HIS CREDITORS.

One who purchases, at a sale of the assets of a bank made by commissioners appointed to liquidate its affairs, a note made by an insolvent, will acquire no greater right against the bank than the bank had at the time of the sale.

A creditor of an insolvent has a right to require the production in court of the bank-book of the syndic to enable him to ascertain the state of the insolvent's affairs.

**A**PPEAL from the District Court of the First District, *Buchanan, J. Byrne*, for the appellants. *Roselius*, contra. The judgment of the court was pronounced by

**SLIDELL, J.** The appellants, *S. Smith & Co.*, having purchased two notes of the insolvent, at a sale made by the commissioners of the assets of the Exchange and Banking Company, obtained an order on the syndic to show cause, on a certain day, why he should not pay them the amount allowed by the provisional tableau filed by the syndic on the 21st July, 1841, and also that he produce in court at the same time his bank-book as syndic. On the day named, the syndic appeared, and answered to the rule, that the dividend due on the notes was paid to the bank before the tableau of distribution was filed and homologated; that the slaves mortgaged to secure the notes were purchased by the bank, and the price retained on account of the mortgage: that afterwards the surplus was paid by the bank to the syndic, and employed in paying other privileged claims, long before the appellants became the holders of the notes; that the payment and settlement were made in conformity with the tableau of distribution duly homologated by the court; and that he has received no funds to deposit since the filing of the tableau. Wherefore he prayed to be dismissed.

Upon hearing the district judge discharged the rule, and the plaintiffs in the rule have appealed.

The tableau proposed the distribution of the proceeds of sale of four only out of five, of the slaves secured by the mortgage, and recognized the bank as a mortgage creditor. The bank had bought these four slaves at the syndic's sale, and retained the price in its hands. This tableau was homologated long before the appellants bought the notes. The appellants acquired no better right against the syndic than the bank had at the time of the sale of the notes by the commissioners; and it is obvious that the bank could not have pretended to make the syndic liable for monies which it had not paid to him, but retained in its own hands.

But that portion of the rule of the appellants which called upon the syndic for the production of his bank-book appears to have been disregarded by the syndic, and to have been overlooked by the court. The appellants had a right to the inspection of the bank-book. One of the five slaves which were mortgaged to secure the notes held by the appellants had been sold, as stated in the tableau, to another purchaser, who had neglected to comply with the terms of sale. The proceeds of the sale of this slave not being in hand at the time of filing this tableau, are not comprehended in the distribution ordered by it, and cannot therefore be claimed under the tableau. But the appellants had a right to know whether the price had been subsequently received by the syndic; and the inspection of the syndic's bank-book was one of the means al-

lowed to the creditor by the statute for obtaining that information. The entire discharge of the rule appears to us, therefore, erroneous.

It is, therefore, decreed that so much of the judgment of the District Court as rejects the claim of the appellants to the proceeds of the sale of the four slaves, *Reuben*, *Carey*, *Hannibal* and *Washington*, be affirmed; and that, in other respects, the said judgment be reversed; and that this cause be remanded to the court below with instructions to the said court to compel, by due proceedings, the production in court of his bank-book by the syndic, so that the same may be inspected by the appellant; the appellee paying the costs of this appeal.

McAULEY  
v.  
CREDITORS.

### LARUE v. HAMPTON.

Where a party to a written instrument acknowledges therein that certain machinery had been furnished by the other party, but the acknowledgment does not enumerate the articles, parol evidence is admissible to prove what articles were furnished. Such evidence is merely explanatory of the acknowledgment; and goes neither against nor beyond it.

**A**PPEAL from the District Court of Terrebonne, *Randall, J. Beatty*, for the plaintiff. *Cole*, for the appellant. The judgment of the court was pronounced by

Rost, J. On the 16th of December, 1845, an agreement was entered into in writing between the plaintiff, *Larue*, and *Hampton*, the defendant, by which a retrocession was made of certain landed property acquired by *Larue* from *Hampton*, on which there was a steam-saw mill, which had been destroyed by fire, while in the possession of *Larue*. The act states that *Larue* retrocedes to the defendant the boiler and engine, and all other parts of the machinery purchased of him, which were not destroyed by fire. The plaintiff reserves the use of the dwelling house, kitchen and yard till the 1st of March, 1846, and that of a circular saw mill erected by him on the place, till he could saw the logs he had, after which he was to surrender the mill to the defendant, until he gave him entire possession, on the 1st of March, 1846. At the foot of this agreement is found the following acknowledgment:

"I do acknowledge that on the 1st day of March next, when my lease is out on the saw mill, that *John Larue* is to have the machinery that he has put to the saw mill, with the shed, as I shall have no further claim on the same.

[Dated the 7th January, 1846, and signed]

"NOAH HAMPTON."

The plaintiff who has delivered the land now sues for the restitution of the machinery mentioned in this acknowledgment.

The defence is that the mill was retroceded to the defendant, with the land on which it is situated; that the paper sued on is no contract, and that imposes no obligation on the defendant to deliver the machinery to which it refers; that the defendant never meant to make a donation to the plaintiff. The District Court gave judgment for the machinery, and \$400 damages. The defendant has appealed.

On the trial below, the defendant's counsel took a bill of exceptions to the opinion of the court allowing the plaintiff to introduce parol evidence to prove what portion of the machinery had been furnished by him. This evidence was properly admitted. The defendant having acknowledged that a portion of the machinery had been furnished by the plaintiff, and the acknowledgment

LARUE  
v.  
HAMPTON.

being silent as to the enumeration of the articles, they could only be ascertained by parol evidence; that evidence is merely explanatory of the acknowledgment, and goes neither against nor beyond it.

On the merits, the judgment is clearly right. The acknowledgment of the defendant explains the previous agreement, and interprets it, as we would have interpreted it, if the acknowledgment had never been made. The evidence in relation to the amount of the damages is conflicting, and we adopt the conclusions of the district judge.

The plaintiff has asked that the judgment be amended and rendered in his favor for the full value of the machinery, instead of the machinery and damages. We believe the judgment as it stands has done justice between the parties. If the plaintiff wished to be indemnified, for the time employed in litigation, he should have asked damages in another form.

*Judgment affirmed.*

## SECOND, Agent, v. ROACH.

Though the defendant in an action on a lost note allege, under oath, that the note was a forgery, the testimony of witnesses will be admissible to prove a presentment of the note and her acknowledgment of its genuineness. In such a case, plaintiff will not be restricted to proof by witnesses who saw the defendant sign the act, or who know it to be her signature because they have frequently seen her write and sign her name, or by experts or comparison of writing. Art. 325 C. P. is an exception to the general rule of evidence, and must not be extended beyond those ordinary cases to which it clearly applies.

**A** PPEAL from the District Court of Ascension, *Randall, J. Augustin and Duffel*, for the plaintiff. *R. A. Upton*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. A former action had been brought upon the note which forms the basis of the present suit, but the parish court-house was destroyed by a conflagration, and with it the note. The petition alleges the destruction of the note, and also states the consideration for which the defendant gave it—goods furnished to her. In her answer she asserted that the note was a forgery, and accompanied the plea by her oath. At the trial the plaintiff offered two witnesses to prove a presentment of the note to the defendant, and her acknowledgment of its genuineness. To the admission of such evidence the defendant objected upon the ground, that, as the defendant had pleaded the forgery under oath, the plaintiff could only be permitted to prove its genuineness, either by witnesses who had seen the defendant sign the note, or who could declare that they knew the signature to be hers, or by experts or comparison of writing, as established by the Civil Code. The 325th article of the Code of Practice declares that: "If the defendant deny his signature in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of writing as established by the Civil Code."

This article was considered in the case of *Plique v. Labranche*, which was

SECOND  
v.  
ROACH.

an action against an indorser who disputed his signature. The note was in existence. Evidence to prove the verbal acknowledgment of *Labranche* that the endorsement was in his handwriting was offered by the plaintiff, objected to by the defendant, and received by the court below. Upon appeal it was held, *Martin, J.* acting as the organ of that court, that the evidence was inadmissible.

The article of the Code, thus interpreted, is in derogation of the general law of evidence, and must, therefore, be strictly construed. It must not be extended beyond those ordinary cases to which it clearly applies, and which alone are to be considered as contemplated by the lawgiver. But the case before us is out of the ordinary category. Here the note has been destroyed; a circumstance not presented in any of the cases cited.

But the defendant argues that, even where the note has been destroyed, it is still possible to meet the requisitions of the Code of Practice. This is true; but it is not the whole truth. The holder of a lost note might perhaps have the good fortune to find witnesses acquainted with the party's handwriting, who had seen the note before its destruction, or persons competent to act as experts who had seen the note. But it is obvious that, in most cases, the owner would be put at disadvantage by the destruction of the note. The range of his evidence would be much circumscribed. He would be restricted to witnesses who had seen and examined the note before its destruction, while in cases where the instrument existed and could be produced, he would have the range of the entire parish for experts, and of the whole State, or Union, or foreign countries, for witnesses to prove the handwriting. We cannot strain the rule of the Code to a case thus out of the ordinary category, and where the ends of justice might be defeated by limiting the plaintiff to a class of witnesses who perhaps could not be found. There was, therefore, no error in the ruling of the court below.

On the merits, the case stands thus: The plea of forgery is met by the testimony of two witnesses, whose character has not been impeached. They prove the presentation of the note to the defendant after its maturity, and her recognition of its genuineness. They prove also that goods furnished to her plantation were the consideration of the note, and that the objection made by her to paying it when presented, was her belief that it had been already paid. Facts sworn to by other witnesses corroborate the statements of these two witnesses. This testimony the jury believed. It satisfied them that the note was genuine, and they found a verdict for the plaintiff. The district judge refused a new trial. Although this court has the power to reverse the verdict of a jury, it is a power we will not exercise except where the verdict is manifestly erroneous; which we cannot say is the case in the present instance.

The exception to the capacity of the plaintiff was properly overruled.

*Judgment affirmed.*

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### BROUSSARD v. NOLAN.

At any time before a verdict is rendered the jury may withdraw it, under leave of the court, in order to make it more explicit.



BROUSSARD  
v.  
NOLAN.

**A**PPEAL from District Court of West Baton Rouge, *Burk, J. Robertson*, for the plaintiff. *Lobdell*, for the appellant. The judgment of the court was pronounced by

Rost, J. This is a petitory action, in which the plaintiff also claims damages. There was judgment in his favor for the land, and for \$128 as damages. The defendant appealed.

The errors assigned on the appeal are as follows: 1st. The judge of the District Court erred in allowing the jury to retire, after they had given in their general verdict, to make it more special, as there was no defect of form to be corrected. 2d. The jury erred in finding damages for the plaintiff.

It appears from the record that the jury brought into court the following verdict: "We the jury find for the plaintiff, \$128 damages." The verdict was read by the clerk, but, before it was recorded, the jury intimated their desire to reform it, and were permitted to retire to the jury room for that purpose. To this proceeding the defendant took a bill of exceptions. Shortly after the jury returned with the verdict upon which the judgment was rendered. It is in these words: "We the jury find a verdict in favor of the plaintiff; the line to be defined agreeably to the survey of *Thomas Mullet*; \$128 damages."

We are of opinion the judge did not err. Before the verdict is recorded the jury are at liberty to withdraw it, under leave of the court, in order to make it more explicit.

The second ground turns upon the evidence. Nothing in the record would authorize us to disturb the verdict of the jury.

*Judgment affirmed.*

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### WILLEY v. CARTER.

An act of sale of real estate acquired by a partnership, must be executed by all of the partners. If signed by two only, it will convey only their interest.

A partition cannot be decreed where one of the co-proprietors has not been represented in the action.

**A**PPEAL from the District Court of Jefferson, *Clarke, J.* "The title of the plaintiffs", says the judge *a quo*, in assigning the reasons for his judgment, "is derived from a sale of *Joseph Cockayne* and *L. G. Robbins* to *Newton Willey*, of one undivided half of three lots. The moiety thus sold belonged to the commercial firm of *Cockayne, Watts & Co.*, which was composed of three persons, *Cockayne, Watts* and *Robbins*; the deed of sale was signed by two of the partners only. The sale conveys the interest of *Cockayne* and *Robbins* only, the Supreme Court having decided that real estate acquired by a partnership is not partnership property."

*Stockton* and *Steele*, for the appellant. *Nickerson*, for defendant. The judgment of the court was pronounced by

*Slidell, J.* Under the authority of several decisions cited by the district judge, he properly decreed the ownership of two-sixths of the land to be in the plaintiffs.

The court below properly refused to decree a partition, because all the proprietors were not represented in the cause. If the share of *Watts* has been divested and has passed to the plaintiff, the fact should have been shown. The testimony is loose and unsatisfactory on the subject of rent. That matter will be open to examination when the parties come to a partition.

WILLEY  
v.  
CARTER.

*Judgment affirmed.*

### BLANCHARD v. DIXON.

The provisions of sec. 32 of the stat. of 7 June, 1806, relative to the police of slaves, must be strictly construed, and the authority it confers upon a *freeholder* cannot be extended to any other person, and where one not a freeholder, in attempting to exercise the authority conferred by that section, shoots and injures a slave, he will be responsible to his master in damages for any permanent diminution of the value of the slave, for the loss of his labor, and the expense of surgical treatment.

**A**PPEAL from the District Court of West Baton Rouge, *Penn. J. Bennett*, for the appellant. *Lacey*, for the defendant. The judgment of the court was pronounced by

**KING, J.** This is an action instituted to recover damages for injuries done to a slave of the plaintiff, who was shot by the defendant, as it is alleged, without provocation. The cause was tried by a jury, who returned a verdict for the defendant, and the plaintiff has appealed.

The facts are uncontradicted, and are derived principally from a statement of the circumstances connected with the occurrence, made by the defendant himself. They are as follows: The defendant is the overseer of *Nolan Stewart*. On Sunday, the 21st of March, 1847, he met the slave in question in the high road, opposite to *Stewart's* plantation, which is in sight of the plaintiff's residence, and asked him if he had a pass. The answer of the slave was in french, and was not understood by the defendant, but the latter, judging from the tone of the slave, conceived it to be disrespectful. The slave was ordered to stop; but instead of submitting, he fled and passed into the field of *Stewart*. The defendant returned into his house, armed himself with a rifle, mounted a horse, pursued and shot the slave, who was in *Stewart's* field, at a distance of about six acres, fracturing his knee. Witnesses who have known the slave for several years, state that he is of good character, quiet, and submissive in his disposition.

The defendant contends, that the slave having been found absent from the plantation of his owner, without a written permission, and unaccompanied by a white person, and having refused to submit himself to examination, and attempted to escape, he was justified in shooting him; and relies upon sections 30 and 32 of the act of the 7th June, 1806. B. & C's. Dig. pp. 53, 54.

The first section relied on provides that, persons residing in the country shall not allow slaves under their control to go out of the plantation to which they belong, without a written permission; and if a slave be found beyond the limits of the plantation to which he belongs without such written permission, and unaccompanied by a white person, he shall be punished in the manner directed by the act, and sent back to his master. The 32d section of the act is in the following words:

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v.  
DIXON.

"If any slave shall be found absent from the house or dwelling, or where his usual place of working or residence is, without some white person accompanying him, and shall refuse to submit himself to the examination of any freeholder, the said freeholder shall be permitted to seize and correct the said slave, as aforesaid; and if the said slave should resist, or attempt to make his escape, the said inhabitant is hereby authorized to make use of arms, but at all events, to avoid the killing of said slave; but should the said slave assault and strike the said inhabitant, he is lawfully authorized to kill him."

We deem it unnecessary to enquire whether a *freeholder*, under the circumstances of this case, would have been justified in resorting to the violent means used by the defendant to arrest a slave, in the day time, on the highway, on a day of rest, suspected of no crime, who is guilty of no assault, and who merely endeavors, by flight, to escape from an examination—more particularly in the absence of proof that he could not have been overtaken by further pursuit, or that the arrest could not have been otherwise safely effected. See *Allain v. Young*, 9 Mart. 221.

The provisions of the sections under consideration are departures from the general law, and must be strictly construed. In the absence of this express legislation, no citizen could legally assume to interfere with the property of his neighbor in the manner authorized by the statute. The extraordinary powers which it confers in relation to slaves have been confided to a certain specified class of citizens, to whose prudence and discretion the legislature supposed they could be safely entrusted. Freeholders alone are authorized by the law invoked, to seize and correct slaves who are found absent from their homes without a written permission, and unaccompanied by a white person, and to use arms in the event of resistance, or of an attempt to escape. This authority cannot be extended beyond the express terms of the statute.

The defendant could only have availed himself of the protection of the statute on which he relies, by bringing himself within its provisions, and showing himself to be a freeholder. This he has neither alleged nor proved; and, under the evidence, we think that he is answerable for the damages which the plaintiff has sustained.

Having the testimony before us in relation to the extent of the injury caused to the plaintiff, we will not remand the cause, but put an end to the litigation by rendering a final decree.

The slave was confined for a year with the wound. His knee has become stiff. At the date of the trial he walked with difficulty, and was compelled to use a crutch. The physician says that he may be able, in a year or two, to walk without the aid of a crutch; that the injury is permanent, but that with time, the use of the limb will be measurably restored.

The witnesses all concur in stating that the slave was worth \$1,000 at the date of the injury, and that his value has been lessened by at least two thirds, in consequence of the wound. The plaintiff has also been subjected to a charge of \$50 for medical services. Under the evidence, we think that \$700 is a fair estimate of the damages.

The judgment of the District Court is, therefore, reversed; and it is decreed that the plaintiff recover of the defendant \$700 as damages, with interest from the date of this decree, and that the defendant pay the costs of both courts.

## THE STATE v. HAYS.

Decisions in *State v. Hebert*, 10 Rob. 41, and *State v. Hooper*, 3 An. 598, affirmed.

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**A**PPEAL from the District Court of Terrebonne, *Randall, J. Cole*, District Attorney, for the State. No counsel appeared for the defendant. The judgment of the court was pronounced by

KING, J. *Hays* was arrested and taken before a justice of the peace, on an affidavit made that he had killed one *Ainsworth*. The justice considered that the evidence established the commission of the crime of murder, notwithstanding which he admitted the accused to bail, in the sum of \$5,000.

An indictment for murder was subsequently found against the accused, who failed to appear and answer to the charge. The district attorney thereupon moved for a judgment against the surety on the bond, which motion was opposed on the ground that the justice was without authority to admit the accused to trial. The objection was sustained, and the State has appealed.

In the case of the *State v. Hooper*, 3 An. R. 598, we had occasion to examine into the powers of justices of the peace to admit parties to bail; and held, in conformity with the decision in the case of the *State v. Hebert*, 10 Rob. 41, that they were incompetent to grant bail when the offence was punishable with death or imprisonment at hard labor for seven years or more, and that bonds taken by them in such cases for the appearance of parties accused were void, being in contravention of a prohibitive law. See Act of 3d May, 1805; Bul. & Cur. Dig. 529. Act of 31st March, 1807; Bul. & Cur. Dig. 530. Sess. Acts, p. 448, § 43.

*Judgment affirmed.*

## LEJEUNE v. HEBERT.

One who purchases land, assuming to pay, as part of the price, a balance due by his vendor to the original owner who purchased with full knowledge of the existence of a servitude on the property, cannot withhold any part of the amount assumed, on the ground of a concealment by his immediate vendor of the existence of the servitude. There is no privity between the original vendor and the last purchaser; the latter must look to his immediate vendor.

**A**PPEAL from the District Court of West Baton Rouge, *Penn, J. Greaves*, for the plaintiff. *W. E. Edwards*, for the appellant. The judgment of the court was pronounced by

ROST, J. This is the second appeal in this case; the first is reported in 2 An. p. 45. The evidence, for the admission of which it was remanded, is in the record, and the only question now before us is, whether the defendant is entitled to claim from the plaintiff a diminution of the price stipulated to be paid by him, on account of the alleged servitude. It was determined against the defendant in the first instance, and he appealed.

The act of the plaintiff and others, making a dedication for a public road

LEJUNIE  
v.  
HEBERT.

which was to pass over the land now held by the defendant, is under private signature, and bears date 5th September, 1840. The plaintiff sold the land to the widow *Leray* on the 9th of November, 1840, and, on the 5th of June, 1841, *Mrs. Leray* became a party to the act of dedication, and agreed to take the place of her vendor, *relativement au chemin qui fut abandonné par lui pour l'usage du public, le 5 Septembre, 1840*. From this statement it is manifest that there was no concealment by the plaintiff from his immediate vendee, and that he is entitled, against her, to the price stipulated in the sale. The record further shows that the act of dedication was recorded on the 2d day of September, 1842, and that, on the 6th of October, 1842, *Mrs. Leray* sold to the defendant, who assumed to pay, as part of the price, the sum remaining due to the plaintiff, and now claimed by him, under that stipulation in his behalf. The act of sale is silent as to the servitude.

If there was any concealment, it was by the last vendor, and she is alone responsible. There is no privity between the plaintiff and the defendant, and the latter has no just cause to withhold any portion of the sum claimed of her.

*Judgment affirmed.*

### GREMILLON v. BONAVENTURE.

When the cause of action is not stated in the petition with sufficient precision, and the effect has been to surprise the defendant and prevent her from setting up the proper defence, the case will be remanded, with leave to amend.

**A**PPEAL from the District Court of Pointe Coupée, *Farrar, J. Lacoste*, for the appellant. *Provosty*, for the defendant. The judgment of the court was pronounced by

*Rost, J.* The plaintiff instituted a petitory action for a tract of land in possession of the defendant. The defence set up was a general denial, a valid title, and the prescription of ten, twenty, and thirty years. At the trial, the defendant produced a regular chain of titles, ascending beyond the longest prescription. But in argument, the plaintiff's counsel placed his claim upon art. 2337 of the Civil Code, which declares dotal property inalienable during marriage, and upon arts. 3490, 2343, of the same Code, which make it imprescriptible during the same time. It was shown that the property had been given in marriage to the plaintiff by her father, in 1811.

The defendant contends that to have the benefit of the articles of the Code on which the plaintiff relies, she should have resorted to the remedy pointed out by art. 2342, and should have brought an action to set aside the sale. Her counsel has alleged in this court that the form of action selected by the plaintiff has operated a surprise upon her, and prevented him from making the proper defence.

We are of opinion that the cause of action was not stated with sufficient precision in the pleadings, and that this omission was well calculated to produce surprise. Justice requires that the case should be remanded.

It is, therefore, ordered that the judgment in favor of the defendant be reversed, and the case remanded for further proceedings, with leave to both parties to amend; the defendant and appellee paying the costs of this appeal.

## FUSELIER, Administrator, v. ROBIN.

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The power to represent a principal in the defence of actions, is not one of administration. Such a power can result only from the express terms of an instrument, or from an implication so clear as to be irresistible.

A mandate which authorizes the agent "*poursuivre le recouvrement de toutes créances, par toutes voies de droit—à ce faire, paraître en justice tant en demandant qu'en défendant,*" empowers the agent where an action has been legally instituted against the principal, as by attachment, &c., to appear and accomplish the purpose of the mandate—the collection of debts due the principal, by pleading in compensation or reconvention; but it confers no such general authority to defend actions as will render service of citation on the agent sufficient.

When a principal is domiciled in a foreign country, having an agent here, an action against the former must be instituted before the court of the agent's domicile.

**A**PPEAL from the District Court of Pointe Coupée. *Farrar, J. Cooley,* for the plaintiff. *Lacoste,* for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The first question to be considered in this case is, whether the power of attorney given to *Delamare* was sufficient to authorize a service of citation upon him, in a suit for a sum of money brought against his principal, a resident of a foreign country. The power so to represent the principal as defendant, is certainly not one of administration. If a judgment be obtained against the principal, it involves grave consequences. Its registry would create a judicial mortgage upon his real estate, and its execution would effect the alienation of his property. Such a power ought not to be lightly recognized. It should result from the express terms of the instrument, or at least by an implication so clear as to be irresistible. In the present case the instrument contains a restricted power to sell the principal's property situate in Pointe Coupée, "*suyvant qu'il pourra en être avisé ultérieurement.*" Again, it expressly authorizes the attorney to appear in court as plaintiff, to collect debts due to the constituent. But it is said the power contemplated the defence of suits. This is true; but the power was qualified, and must be restricted to the cases specially enumerated "*poursuivre le recouvrement de toutes créances par toutes voies de droit—à ce faire paraître en justice tant en demandant qu'en défendant.*" Under this power if a suit were legally instituted against the principal in Pointe Coupée, as it might have been by attachment &c., *Delamare* would have been authorized to appear and accomplish the purpose of the mandate, the collection of debts due to his principal, by pleading in compensation or reconvention. This interpretation satisfies the words of the power, and gives them effect.

In the interpretation of this power it is not improper to notice the difference of its language from that contained in another power, (which the plaintiff has offered in evidence,) given by *Robin* to *Landreaux*, by public act, a few days after the power to *Delamare*. This power, while more comprehensive in other respects, is also broader with regard to the defence of suits. Its language is unqualified—"paraître en justice tant en demandant qu'en défendant." We are, therefore, of opinion that *Robin* could not be made a party defendant in this action by the service of a citation upon *Delamare*.

FUSELIER  
v.  
ROBIN.

A citation was also served upon *Landreaux*. This suit was brought in the District Court at Pointe Coupée. *Landreaux* was domiciled in New Orleans, and his principal was domiciled in a foreign country. *Landreaux* appeared and pleaded the exception of domicil, contending that the suit should have been brought in a court at New Orleans. This exception should have been sustained. Our Code has adopted as the general rule the maxim of the civil law, *actor sequitur forum rei*. The rule is founded upon the consideration that the party attacked will thus have the greatest facility in making his defence; and the spirit of the rule seems to us to apply with equal force to the attorney of a party domiciled abroad.

It is, therefore, decreed that the judgment of the District Court be reversed, and that the petition be dismissed as in case of non-suit; the plaintiff paying costs in both courts.

### KNOX v. THE POLICE JURY OF WEST BATON ROUGE.

One who has constructed a levée on the lands of an absentee, under an adjudication made by the police jury, which has been accepted by the inspector, in case of the lands not selling for the amount of the adjudication and of there being no other property of the absentee within the parish, may recover the balance from the police jury.

**A** PPEAL from the District Court of West Baton Rouge, *Nickolls, J. Elam*, for the appellant. *Brunot and Bennett*, for the defendants. The judgment of the court was pronounced by

ROST, J. The police jury of West Baton Rouge caused to be sold to the lowest bidder, the making of a new levée and road, in front of a tract of land belonging to *L. Dupuy*, an absentee. *Edward Brady* and *William McGrovan* became the contractors, for \$3000, and gave bond and security, to the satisfaction of the inspector of roads and levées, for the faithful performance of the contract. The work was completed in due time, and accepted by the inspector. *Dupuy* having failed to pay, an order of seizure was issued against the land, which was sold for \$15. The plaintiff having subsequently purchased the claim of the contractors, called upon the police jury to pay it, and, on their refusal to do so, this suit was instituted. The defence is a general denial and a special plea that the defendants are not legally bound to pay for making the levée, as it is not only erected for the good and protection of the parish of West Baton Rouge, but also to protect a great extent of territory, within the State, and beyond the limits of the parish. The case was tried before a jury, and a verdict obtained by the plaintiff for \$700 and interest. He has appealed.

The authority of the inspector is not denied in the answer. The allegations of the defendants that they erected the levée not only for the good and protection of the parish of West Baton Rouge, but also to protect a much greater extent of territory, is inconsistent with the other facts of the answer. The adjudication is proved as alleged. It is in evidence that the land was sold judicially for the sum of \$15. It is admitted that *Dupuy* is an absentee, and there is no evidence that he has other property in the parish. Under the decisions of this court in the cases of *Morgan v. Police Jury of Pointe Coupée*,

11 La. p. 157, *O'Brien v. Police Jury of Concordia*, 2d An. 355, and *Michel v. Police Jury of West Baton Rouge*, 3d An. 123, the defendants are bound to pay the price of the adjudication. KNOX  
v.  
POLICE JURY.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the plaintiff for \$2,985, with legal interest from the 6th of October, 1845, and costs in both courts.

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| 119 | 409 |

### HOLMES et al. v. BARCLAY et al.

An action will lie in this State for damages done to the property of the plaintiff by a steamer in another State, though by the laws of the latter the action would be held to be local. Such an action, under our laws, is a personal action.

An attachment will not lie in an action for damages *ex delicto*.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. C. M. Randall*, for the plaintiffs. *Benjamin and Micou*, for the defendants. The judgment of the court was pronounced by.

**EUSTIS, C. J.** This is an action against the defendants for damages caused by their steamer, the *Belle Air*, during the high flood of the Mississippi, in June, 1844, in running into and destroying a brick warehouse and injuring a steam mill belonging to the plaintiffs, in the town of Chester, State of Illinois. The District Court gave judgment for the plaintiff for the sum of \$3,500, with interest, and the defendants have appealed.

That the damages to the plaintiffs' property was occasioned by the fault of those who had charge of the steamer, we think, with the district judge, clearly results from the evidence; but we are not able to concur with him in his opinion as to the amount which the defendants are bound to reimburse the plaintiffs. We have, on several occasions, expressed our opinion on the unsatisfactory character of all general estimates of damage resulting from the destruction of buildings and other works, without the details being given, which would enable us to test their accuracy. In this case the mill has been since repaired, but we have no evidence of the amount expended for the repairs, and have nothing before us but declarations of the amount of the damage. This is certainly not the best evidence which it was in the power of the plaintiffs to produce of the amount of the damage sustained by them, and we feel bound to receive it with great reserve. The brick building was demolished, and we have evidence before us which will enable us to fix its value at the time of the accident, in the summer of 1844.

As we consider the plaintiffs not liable for remote damages, we think the sum of \$1,600 is all they are entitled to recover, under the evidence.

The exception taken by the defendants that the plaintiffs' action could not be maintained in this State, because under the common law, which prevails in Illinois, it would be held to be local, and the plaintiffs' remedy be confined to the county in which the cause of action originated, was properly overruled by the District Court. The present action is, under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought.

This suit was commenced by attachment, and the judgment of this court is



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asked upon a decision of the district judge discharging a rule taken by the defendants in order to have the attachment set aside. We have held that an attachment will not lie in an action for damages *ex delicto*, and the defendants, on their simple motion, could have had the attachment in this case set aside. But the application was made upon certain specific grounds, other than this, as is contended by the counsel for the plaintiffs. One of them was, that the affidavit was insufficient to justify the attachment. At the time of the application the plaintiffs' petition had been filed, which disclosed their cause of action, from which it resulted that no attachment could issue in the cause.

The affidavit was in the words of the statute of 1839 (Acts of 1839, p. 168, § 16) *ipsissimis verbis*. But the cause of action being one upon which no attachment could by law issue, the affidavit cannot be tested by that standard, which regulates cases in which attachments can issue. The cause of action being insufficient to maintain the attachment, the insufficiency of the affidavit to justify the attachment follows of course. The objection is not one of form, but is to the basis of the action. We, therefore, think the court ought not to have discharged the rule, but to have dissolved the attachment.

The defendants having, however, appeared and pleaded to the action, judgment must be rendered against them.

The judgment of the District Court is, therefore, reversed, and it is ordered that the plaintiffs recover from the defendants, *in solido*, the sum of \$1,600, with interest thereon from the 28th of March, 1845, at five per cent; that the attachment be dissolved at the cost of the plaintiffs; and that the plaintiffs pay the costs of this appeal, and the defendants the ordinary costs, exclusive of the attachment costs, in the District Court.

#### SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

In an action in this State for damages for an offence or quasi-offence committed in another State, by the laws of which a jury might have allowed interest on the amount of damages assessed, the plaintiffs may recover interest from judicial demand on the estimation of the damage, where such interest is allowed as a part of the damages.

ON an application for a re-hearing in this case, the judgment of the court was pronounced by

SLIDELL, J. The interest in this case having been allowed by the District Court, we confirmed that portion of the judgment, because we considered it as part of the damages, and allowed as such. In Illinois, where the cause of action accrued, it would have been competent for a jury to have allowed interest in making up the estimate of damages, and we thought the plaintiffs entitled to the same indemnity here.

*Re-hearing refused.*

## HAYDEN v. NUTT et ux.

In principle, no distinction can be made between a conventional transfer of property by a husband to his wife for the payment of her dotal or paraphernal rights, and one made under the form of judicial proceedings. *Per Curiam*: Where there has been an amicable suit in which the wife charges, and the husband confesses, a debt, and the judgment thus rendered is executed by the sheriff, the parties, so far as creditors are concerned, stand substantially in no better position than if they had merely clothed their contract with the form of a notarial act.

The law of the place where the parties intend, at the time of their marriage, to fix their domicile, when there is no marriage contract or one without any provision in this respect, and when that intention is unequivocally ascertained, and supported by a subsequent removal to the place contemplated, governs the rights resulting from the marriage.

Where a marriage is contracted in a State in which the husband was domiciled at the time, and there was no change of domicile, nor any absolute and clear intention to change it, before the receipt by the husband of the property of the wife, the law of the place of the marriage must control the rights of the wife.

By the laws of Virginia and Mississippi money and bank-stock bequeathed to a woman subject to the condition of being returned to the estate of the testator in case of her dying without issue living at her death, will become the property of her husband, by her marriage and the reduction of it into possession by the husband. His obligation to return the amount to the estate of the testator in case of the wife's death without issue living at the time, cannot prevent his acquiring the ownership of her interest, which is personalty.

A husband cannot abandon, in favor of his wife, a claim due to him, to the detriment of his creditors.

Where money and bank-stock were bequeathed by one who resided and died in the State of Virginia, on the condition of its being returned to his estate in case of the death of the legatee without issue living at the time of her death, and the legatee removes to this State and dies here without issue bequeathing the whole of the property to a third person, the bequest made in Virginia, being valid by the laws of that State, it would be to strain the policy of our laws to an unreasonable extent to refuse to enforce it here, in a contest between the executors of the first testator and the legatee under the will made in this State.

As a general rule, husband and wife are incapable of contracting with each other. The only exceptions to this rule are those enumerated in art. 2421 C. C. Attempted contracts between husband and wife not included in these exceptions, are nullities.

Actions to annul contracts made between husband and wife, not enumerated in the exceptions contained in art. 2421 C. C., are not prescribed by one year under arts. 1982, 1989 C. C., the nullity in such cases resulting from the incapacity of the parties to contract. That prescription applies where the transfer takes place between parties capable of contracting.

An act executed in another State in favor of a vendor by one who had purchased a tract of land in this State, which recites that "for the consideration of one dollar, and the further consideration of securing to the vendor the payment of certain notes" executed for the price, he sells and conveys the property to his vendor, the act stipulating that if he should pay the said notes "then these presents and the estate hereby granted shall become utterly void" &c., duly recorded in the mortgage office of the parish in which the land is situated, will have the effect of a mortgage in this State. C. C. 3257. Nor will the benefit of the mortgage be restricted to the mortgagee; the transferees of the debts intended to be secured are entitled to the benefit of the accessory obligation. C. C. 2615.

A mortgage duly registered in the mortgage office of the parish in which the land lies, will not be effected by the subsequent division of the parish, and the establishment of a separate parish embracing the land mortgaged.

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| 46  | 990  |
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| 52  | 1437 |
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| 115 | 163  |
| 4   | 65   |
| 119 | 690  |

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**A**PPEAL from the District Court of Madison, *Selby, J.* This appeal was taken by the plaintiff from a judgment rendered on the verdict of a jury, in favor of the defendants. *Stockton and Steele*, for the appellant. *Short, Thomas and Snyder*, for the defendants. The judgment of the court was pronounced by

**SLIDELL, J.** The plaintiff is a creditor of *Nutt*, and instituted this suit for the purpose of setting aside a judgment rendered in favor of *Mrs. Nutt* against her husband, and a judicial sale of lands, slaves, cattle and other property made to her in block, under execution, for a total price of \$16,600. The plaintiff charged that the judicial proceedings between the husband and wife were collusive and fraudulent, and that the alleged indebtedness of the husband to her never existed.

A branch of this case, upon the appeal of another creditor, has been before us. See *Dennistoun v. Nutt*, 2 Annual, 483. We then expressed the opinion that, in principle, no distinction was to be made between a conventional transfer of property made by the husband to the wife for the payment of her dotal or paraphernal rights, and one made under the form and by the instrumentality of judicial proceedings, upon confession. To this opinion we adhere. Where there has been an amicable suit, in which the wife charges, and the husband confesses, an indebtedness, and the judgment thus rendered is executed through the sheriff, the parties, so far as creditors are concerned, stand substantially in no better position than if they had merely clothed their contract with the form of a notarial act.

We shall therefore examine the questions presented in this case as though, in August, 1844, the date of the sheriff's deed, *Nutt* had executed in favor of his wife a sale of the lands, slaves and other property, at the price of \$16,600, and in partial satisfaction of an admitted indebtedness to her of \$26,883 70, for so much money, her paraphernal property, received by him.

The petition in that cause stated two sources of the wife's claims, one was her interest in the estate of her father, from whom she alleged that she inherited, in the year 1839, in her own right, the sum of \$10,441 85. The other was, as the universal legatee of her sister *Susan E. Blake*; who, it was alleged, died in 1839, leaving an estate to an amount of \$16,441 85, the whole of which the husband received, and appropriated to his own use.

With regard to the first claim, the material facts are as follows: *Adeline Blake*, the wife of *Nutt*, was a native of Virginia. Her father resided in that State, and died there in 1831. By his will he gave his daughters, *Susan*, *Catharine*, and *Adeline*, thirty-five shares each of Virginia bank stock, to be held in trust by trustees named in the will. until each of them should arrive at the age of twenty-one years or marry; and, in the event of either of them dying without leaving a child or children living at the time of their death, the said bank stock so given to them was to return back, and be considered as the testator's estate, and be divided equally among his other children. After making other legacies the testator directed that the residue of his estate should be divided among his six children, *Frances Brockenbrough*, *Susan*, *Catharine*, *Adeline*, *Benjamin* and *Jane*; "the portion given to the last five named to be held in trust by my trustee hereinafter named, upon the same conditions and limitations as is directed and made with respect to the other devises to them in this my will." *Brockenbrough* was named executor, and also trustee of *Susan* and *Adeline*.

*Nutt*, who had been a resident of Virginia, came to Mississippi, in the

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fall of 1832. He had been there previously for two or three years. *Adeline* came to Mississippi, in 1832. They remained at Vicksburg, in that State, until March, 1833, when they were married there. Witnesses acquainted with them, at that time, say that it was stated by both parties in conversation before their marriage, that they intended to live at New Orleans. On the morning of the marriage they left Vicksburg, and went to New Orleans. *Nutt* was a physician, and perhaps contemplated the practice of his profession there, as he had done at Vicksburg. They remained however, but two weeks in New Orleans, when they returned to Mississippi. *Nutt* left his wife at a watering place in Mississippi, went to Virginia, received a part of his wife's estate from *Brockenbrough*, and returned to Vicksburg, where he kept house, and resided with his wife until the year 1837. He bought lands in Louisiana in 1834, and occasionally visited them. In 1835, he had some negotiation with a party with regard to erecting a dwelling house on his land; and told this person that he intended to remove thither and reside. But this intention was not carried out until 1837, when he took up his residence upon the lands in the parish of Madison, and has lived there, with his wife, ever since. In May, 1833, when *Nutt* receipted to *Brockenbrough* in Virginia, he described himself in the receipt as of New Orleans. In another receipt, in 1834, he describes himself as of Mississippi. In deeds executed by him in 1834 and 1835 he described himself as of the town of Vicksburg. The bank stock was received by him from *Brockenbrough* in Virginia, in 1833. His amount was \$3,500; and it was transferred to *Nutt* personally. In 1834, he received in money, from *Brockenbrough*, in Virginia, about \$5,000. The only other payment from the estate on his wife's account was a nett sum of \$610 41, received by *Nutt*, in 1839.

It may be conceded that the defendants' counsel is correct in assuming that the marital rights of these parties must be regulated by the laws of their matrimonial domicile. What then was the matrimonial domicile at the time when the husband received the \$5,000 and the stock from *Brockenbrough*? The learned counsel for the defendants agree that they intended Louisiana to be their domicile; that they followed up that intention by an immediate removal; and by even their brief sojourn at New Orleans acquired a domicile there. We do not concur in this view of the facts, nor in the legal conclusion deduced from it. We think the testimony does not authorize the belief that they had formed the absolute determination to establish themselves at New Orleans; and their subsequent conduct is the safest guide to their real intention. It was, we think, to live at New Orleans, if it suited them. They went there; remained two or three weeks; it did not suit them; and they returned to Mississippi, where they kept house and were domiciled until 1837.

It is far from our desire to disturb the well settled principle that the law of the place where, at the time of the marriage, the parties intend to fix their domicile, is to govern the rights resulting from that marriage, when that intention is unequivocally ascertained, and supported by a subsequent removal to the place contemplated, within a reasonable time. The doctrine is as ancient as the Pandects, and seems in a remarkable degree to have received the assent of commentators upon the conflict of laws, who are so often found at variance with each other. But the impropriety of applying the doctrine to the present case is perhaps best illustrated by a brief reference to some of the cases which the counsel for the defence have cited. In *Martin v. Ford*, the authority of *Cejas* was cited with approbation. "Mulier non agit ubi matrimonium

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*contrahit ; sed ubi ex matrimonio migravit, vel divertit, agit.*" And it was said by Martin, J.: " We think that it may be safely laid down as a principle that the matrimonial rights of a wife, who, as in the present case, marries with the intention of an instant removal, for residence in another State, are to be regulated by laws of her intended domicil, where no marriage contract is made, or one without any provision in this respect." But what were the facts to which the doctrine was applied ? The slaves which formed the subject of controversy were the property, and in the possession, of the wife, in the State of Mississippi, before her marriage. She was married in Mississippi ; but her husband had, at the time, a furnished house and farm in Louisiana, and had sent a wagon to remove his wife's property to Louisiana. The wife had previously expressed her intention to reside permanently in Louisiana—left Mississippi for Louisiana the day after the marriage, and lived there with her husband until his death. Before the marriage, the intended husband executed a deed of settlement for the slaves, who were conveyed to trustees for her benefit. The husband was considered, under this state of facts, as having never acquired any right to the slaves.

In *Routh's* case, it was held to be the settled doctrine that, if parties contracted marriage with a *bond fide* intention of making Louisiana the place of their matrimonial residence, and in pursuance of such intention did, within a reasonable time, become domiciled in this State, the property belonging to the wife before marriage, and received by the husband afterwards, or at the time, remained her separate property. The facts were that *Routh*, who married sometime between the years 1814 and 1820, was, at the time of his marriage, exercising and enjoying the rights of a citizen of Louisiana ; sometimes acting as a member of the police jury in a parish of Louisiana ; sometimes as a representative in the house of assembly ; frequently as a juror. He also acted, at the time of the marriage, as overseer of his father's plantation in Louisiana, and lived there for some time after his marriage ; and, although subsequently he had a town house at Natchez, still divided his time between the Louisiana and Mississippi residences, and did not relinquish his Louisiana citizenship. There were also other circumstances of a similar import ; and the removal of the wife to Louisiana was proved to have been in pursuance of a previous declared intention of the parties.

Upon a sound construction of these authorities, we cannot consider the law of Louisiana as operating upon the rights of *Mrs. Nutt*, with regard to the sum of \$5,000, and the stock received by her husband, and treat them as paraphernal. At the time of the marriage *Nutt* was domiciled in Mississippi. The marriage was contracted there. That domicil was not changed before the receipt of the money and stock ; nor was there an absolute and clear intention to change it, the frustration of which could perhaps be regarded as a fraud upon the wife. The law of Mississippi must, therefore, control the wife's rights.

Under that law, we conceive the wife's pretensions cannot be sustained. Her personality, reduced into possession in the years 1833 and 1834, became his *jure mariti*. It cannot now be treated as her paraphernal estate, because the parties, some years subsequently, chose to remove to this State—a removal evidently disconnected with their original views.

We have considered this branch of the case with reference to the position assumed by *Mrs. Nutt*, that her right as legatee was one of absolute ownership of what was bequeathed to her by the will of her father. But if, on the other hand, we take the legacy as it really was—a legacy, in terms not constituting it

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to her separate use, with a right of reversion to the estate of her father, if she should die without issue, does her case stand upon a better footing?

We have not been informed by counsel what would be the effect, by the laws of Virginia or Mississippi, of the receipt of the money by the husband, or the transfer of the stock to his name, under such circumstances. The result of our examination is, that it does not place the wife on more advantageous ground than she would occupy under the hypothesis assumed by herself. The legacy gave her a life interest in the stock and money. That interest passed to him by marriage and the reduction into his possession. His obligation to return so much to the estate of *Blake*, if she died without issue, did not prevent his acquiring the ownership of her interest, which was personalty.

It is, therefore, clear that the wife was not, at the date of the rendition of the judgment in her favor against her husband, the creditor of her husband, as alleged in her petition, and confessed by him, "for the sum of \$10,441 85, inherited from her father *Benjamin Blake*, deceased, in the year, 1839, in her own right," "which her said husband received and appropriated to his own use and benefit, without her authority and consent." The utmost extent to which we could treat her as a creditor on that score, would be for the sum of \$610 40, received by *Nutt* in 1839, after the domicile was acquired in this State.

The material facts with regard to that portion of her claim which she makes as heir of her sister *Susan*, are as follows: *Susan's* share, under her father's will, was about the same as that of *Mrs. Nutt*. She had a legacy of thirty-five shares of bank stock, amounting to \$3,500. Whether *Nutt*, who received the certificate for her, appropriated it to his own use, does not clearly appear. He appears to have collected in cash for *Susan Blake* from *Brockenbrough*, about \$2,000 or \$3,000. He also collected for her a legacy of \$5,000 left to her by *J. B. Blake*, and a sum of \$1,000 from the sale of a slave belonging to her. *Susan Blake* made a will in 1838, and died in 1839. She had lived with *Nutt's* family in Mississippi, and afterwards when they came to reside in Louisiana. By her will she gave her entire estate to *Mrs. Nutt*. She states in her will that her property had been in the hands of *Nutt*, and that he was not to pay interest for it. She enumerates a sum of \$6,000 as being in his hands, being the *Blake* legacy and the price of the slave; and it is also to be inferred from the will that he was still her debtor for what was received from her father's estate. On the other hand, she recognizes him as her creditor for board and medical attendance, pursuant to her agreement with him. This will was probated; but there is nothing to show that the succession of *Susan Blake* was ever administered. Although *Mrs. Nutt* was the universal legatee, she could only take the residue of the succession after payment of its debts. What they were is not ascertained. That *Nutt* was a creditor appears from the will; and we do not see with what propriety he could, (as counsel say he had the right to do,) abandon an important claim, in favor of his wife, and to the detriment of his creditors. Such, however, was the course pursued; for *Mrs. Nutt* claimed the entire amount of the unadministered succession of *Susan Blake*, and had judgment upon confession accordingly. Moreover the judgment was for a sum considerably larger than was received by *Nutt* on *Susan Blake's* account, during her life time.

But there is another serious objection to *Mrs. Nutt's* claim as heir of her sister; and which is quite independent of the facts that the succession was not administered, that an important credit was abandoned, and that the amount

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claimed was larger than *Nutt* had received on *Susan Blake's* account during her life time.

By the terms of the will of *Benjamin Blake*, the legacy to *Susan* was not absolute, but conditional. In the event of her death, without issue, the amount bequeathed to her was to return back, be considered as part of the testator's estate, and be equally divided among the other children. When *Nutt*, as the agent of the legatee, received her share from *Brockenbrough*, he and his principal being then domiciled in Mississippi, a refunding bond was given by him to *Brockenbrough*, for the restoration of the amount to the succession of *Benjamin Blake*, if *Susan* should die without issue. Upon the faith of that bond, *Brockenbrough* paid the money.

No argument has been adduced to show that the condition of the legacy violated any law of the State of Virginia; nor that there was any thing in the laws of Mississippi which would have prevented *Brockenbrough*, as the executor of *Benjamin Blake*, from recovering the amount of the legacy from the succession of *Susan Blake*, if her succession had been opened there, or from *Nutt*, upon the bond of indemnity.

But it is said that the property was in this State, when the event happened under which the right of return took effect; that the clause created a substitution; conflicts with a prohibition of our law; and that, consequently, the right of *Benjamin Blake's* succession cannot be enforced. The case of *Harper v. Stanborough*, 2 Annual 337, is cited.

In that case the controversy was with regard to slaves, which our law considers as real estate, and the issue of slaves born in this State; and the contest was between *William Harper*, the surviving child of the testator, claiming under the limitation of the executory devise, and third persons, who had purchased in good faith at the sale of the succession of *Jesse Harper*. The court held that it would not violate the policy of our prohibitive laws by aiding *William Harper* in disturbing the purchasers. The present case is certainly dissimilar. Here the question involves a sum of money. No creditors of *Susan Blake* are interested in the controversy, nor purchasers from her succession. Waiving the consideration that her succession has not been administered, and that there has been no judicial action by the probate court upon the rights of the legatee under *Susan Blake's* will, let us strip the case of any technical difficulties, and suppose that the representative of *Benjamin Blake's* succession, and *Adeline Blake*, as the legatee of *Susan*, were before us, claiming from *Susan Blake's* administrator a distribution of her estate. *Adeline Blake* would demand the whole estate under the will; and *Brockenbrough*, as the executor and trustee of the children of his testator, would demand the restoration of the amount which had been paid to *Susan Blake*. It seems to us that in such a contest *Brockenbrough* would prevail. To the tacit obligation of *Susan Blake* to respect the condition attached to the bequest was superadded a new and express contract, at the time of receiving the legacy, that the amount should be restored if she died without issue. There is no reason to believe that this conditional contract for the payment of a sum of money at a future time, was invalid under the laws of Virginia or Mississippi: and it would be straining the policy of our own laws to an unreasonable extent, to refuse to enforce it here in a contest between the legatee of *Susan Blake* and the executor of her father's will. *Brockenbrough*, in his testimony, speaks, with some warmth perhaps, but certainly with reason—"I never knew anything of the transactions between *Susan E. Blake* and *C. R. Nutt*. They lived in Mississippi; I, in Virginia.

But this I know, in justice and equity, four-fifths of *Susan's* estate left by her father should return to the estate of *B. Blake*, as designed by his will, and for which I hold a refunding bond." The claim then of *Mrs. Nutt* was, we think, unfounded, as to the four-fifths of the amount received by *Nutt*, as agent of *Susan Blake*, from her father's estate.

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The result of the examination of the two claims is, that the indebtedness of the husband to his wife could not have exceeded the sum of \$8000.

But, under the guise of judicial proceedings, conducted amicably and by confession, and which in law are of no greater force than a conventional transfer, *Nutt* has conveyed to his wife a property, which at the standard of a sheriff's sale was worth \$16,600, and which the appraisers at the time estimated at a cash value of \$24,884 89. This sale is made by an embarrassed debtor, pursued at the time by other creditors, confessing a liability to his wife far beyond what was legally due, and, for ought that appears to the contrary, sweeping away, by a sale in block, his entire estate. We are constrained to say that we cannot reconcile the transaction with a proper sense of duty to his creditors.

The law applicable to the contracts of husband and wife has been explained in the case of *Spurlock v. Mincer*, 1 Annual, 305, and need not now be considered at large. We then showed that, by the general rule, the husband and wife are incapable of contracting with each other. That the exception is in the three cases enumerated in article 2421 of the Code. That out of these enumerated exceptions attempted contracts between husband and wife are nullities. We are of opinion that the present case does not fall within the exceptions. A large portion of the wife's claim had no legal existence. The utmost amount due fell far below the price at which a large estate was sold in block to the wife. The circumstances are inconsistent with the belief that the sale was effected for the legitimate purpose of satisfying a debt believed to have a real and legal existence to the extent claimed. We are bound, therefore, to give the creditor of the husband relief, by setting aside the sale.

The prescription applicable to a case of this kind is not that established by articles 1982 and 1989 of the Code. That prescription applies to cases where the transfer takes place between parties capable of contracting. The nullity in this case flows from the incapacity of the parties to make a contract not legitimately falling within the exceptions enumerated in the 2421st article of the Code.

The plaintiff also asked to be recognized as the holder of a conventional mortgage upon the undivided half of a tract of land, forming part of the property bought by *Mrs. Nutt* at the sheriff's sale. This undivided interest was bought by *Nutt* from *Dawson*, in 1835; and he executed a deed in the form usual in common law States, by which he declared that, "for the consideration of one dollar, and the further consideration of securing to said *Dawson* the payment of four notes, etc.,," (those given for the price of the land,) he sells and conveys, etc., the property in Carroll, etc., describing it, with a proviso that if he should pay the notes, "then these presents, and the estate hereby granted, shall become utterly void and cease and determine." This deed was recorded in the mortgage book in the parish of Carroll, where the land lay, in 1835. The parish of Madison, subsequently created, comprised these lands, and the instrument was recorded as a mortgage in the latter parish, in 1845.

This contract would certainly be considered a mortgage in the State of Mississippi, where it was executed; and though it is not expressed in the language in which mortgages are usually expressed in this State, we think it may be



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fairly construed as falling under that class of contracts. It is, in its terms, an accessory contract, intended for the assurance of the payment of a principal contract. It is difficult to exclude this instrument, taken in its fair intendment, from the scope of the definition given in our Code—"the conventional mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession." C. C. 3257. Such was the view expressed by the court in *Smoot v. Russell*, 1 Mart. N. S. 524, commenting upon a similar instrument with reference to the corresponding article in the Code of 1808. "It would seem then," said the court, "to come almost within the letter of the definition, and there would be little difficulty on our part in saying that it came completely within it, were it not for a subsequent provision of the same authority, article 6, which declares that there is no conventional mortgage except that which is expressly stipulated in the act or writing made between the parties; it is never understood, and is not inferred from the nature of the act." This difficulty has ceased to exist, for the article thus noticed has been omitted in the new Code.

We see no reason, from the language of the act, to restrict the benefit of the mortgage to *Dawson*, the mortgagee. Its purpose was to secure the debts named in it; and the transferees of those debts are entitled to the benefit of the accessory. C. C. 2615.

We do not think the right acquired by the inscription of this mortgage in the parish of Carroll, was affected by the subsequent establishment of the parish of Madison, which embraced the lands mortgaged.

It is, therefore, decreed that the judgment of the court below be reversed. It is further decreed that the plaintiff, *Noah Hayden*, be recognized as the conventional mortgagee for the sum of \$1097 36, with interest on said sum from the 4th day of February, 1838, of the following lands, to wit: the lands described in the indenture, or deed of mortgage opened in this cause, as the undivided half of the lots or parcels of land situate in the parish of Carroll, (now the parish of Madison,) numbered 24, 25, 26, 27, and 28, in township eighteen, of range thirteen east, in the district of lands north of Red river, Louisiana, containing in all eight hundred and ten acres; and that the said lands be sold to pay the said mortgagee, the sum and interest aforesaid, and costs of this suit. It is further decreed that the judgment rendered on the 7th May, 1844, by the court of the Ninth Judicial District of Louisiana, sitting in and for the parish Madison, in favor of *Adeline Blake*, against her husband, *Conway R. Nutt*, for the sum of \$26,883 70 and interest, with legal mortgage, and also the adjudication made at sheriff sale to the said *Adeline Blake*, upon execution of said judgment, and the sheriff's deed in pursuance of said adjudication, of which said judgment, adjudication and sheriff's deed copies are on file in this cause, and whereunto reference is now made, be adjudged null and void, so far as they affect the said *Noah Hayden*, and that the said *Noah Hayden* have leave to seize and sell the said lands, slaves and property in said sheriff's deed recited, upon *fieri facias* issuing upon the judgment, obtained for his use against *Conway R. Nutt*, on the 17th day of May, 1844, of which judgment a copy is on file in this cause, as though said adjudication and sheriff's deed to the said *Adeline Blake* had never been made.

It is further decreed that, the said *Adeline Blake*, be recognized as a creditor of the said *Conway R. Nutt*, with legal mortgage, for the sum of \$610 41, and interest from this date, being so much money, her paraphernal property, re-

ceived by her said husband on 1st July, 1839, and by him converted to his own use, said legal mortgage to date from the first day of July, 1839, and to take precedence of the claim of said *Hayden* as to all the real estate and slaves comprehended in said sheriff's deed, save only the real estate upon which the said *Hayden* is herein above recognized as a creditor by conventional mortgage.

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It is further decreed that, whatever claims and rights of legal mortgage the said *Adeline Blake* may have against the said *Conway R. Nutt*, by reason of her being the legatee of *Susan Blake*, be reserved, with leave to the said *Adeline Blake* to prosecute the same by way of third opposition or otherwise. And it is further decreed that, the said defendants pay the costs in both courts.

### MAYOR ETC. OF THIBODEAUX v. MAGGIOLI.

Where judgment is rendered in favor of a municipal corporation in an action for the removal of buildings alleged to be on land reserved by law for a public road, if the jury find that they are in a public place, and do not come under the provisions of art. 858 C. C., no damages can be allowed to the proprietor.

No silence or length of time can deprive a corporation of its power over public places. Its inaction may give an estate by sufferances, but nothing more.

A question as to the breadth of land which a municipal corporation has a right to require for the construction of a road and levée is, within certain limits, an administrative question, to be left to the discretion of the local authority.

**A**PPPEAL from the District Court of Lafourche Interior, *Randall, J. J. C. Beatty*, for the appellants. *C. A. Johnson*, for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiffs claim the demolition and removal of certain wooden buildings, alleged to be on the land reserved by law for a public road, on the left bank of the bayou Lafourche, and within the limits of their jurisdiction. The defence is a general denial, and a prayer that, should the judgment be in favor of the plaintiffs, the defendant may have judgment for \$10,000 damages.

The case was tried before a jury, who returned a verdict in favor of the plaintiffs, and allowing the defendant *Maggioli* two year's rent of the building to be removed, at the rate of \$17 per month. On this verdict the court decreed that the building be removed, and that the plaintiffs pay *Maggioli* \$408 damages. The plaintiffs appealed.

It is clear that this judgment cannot stand. The jury having found that the buildings were on a public place, and not considering them as coming under the provisions of art. 858, C. C., no damages should have been allowed. It is contended by the defendant's counsel that the plaintiffs and the police jury before them, suffered the defendants and others to place the levée nearer to the stream, and to occupy and build upon the ground now claimed without opposition of any kind, and that they are bound by their implied assent and lapse of time. No silence or length of time could deprive the corporation or its predecessors of their powers over public places. Their inaction gave the defendant's an estate at sufferance, and nothing more. *Mayor et al. v. Magnon*, 4 Martin p. 2.

The defendant farther alleges that he has already furnished one road to the public, and that he is not bound to furnish another, without compensation. He

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relies in support of that position on the case of *Henderson et al. v. Mayor etc. of New Orleans*, 5 La. 423. We have doubts as to the correctness of that decision; but it appears to us that the present case does not necessarily come under it. The pleadings concede that the defendant's lots are bounded by the public road passing on the bank of the bayou, and the only question is as to the breadth of land which the plaintiffs have the right to require for the road and levée. This, within limits which have not been exceeded in the present case, is an administrative question, left to the discretion of the local authority, with which nothing requires that we should interfere.

The premises considered, it is ordered that the judgment be amended so as to allow the defendant no damages, and that as amended it be affirmed, with costs.

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### MOORE et al. v. THIBODEAUX.

The surety in a tutor's bond cannot be released, for the purpose of testifying in favor of the tutor in an action against the latter to compel him to account, though other and sufficient security be offered by the tutor.

Where a wife, after remaining in this State, where her husband was domiciled, removes to another in conformity with the decree of her husband, on account of superior advantages supposed to be afforded by the latter for rearing and educating their children, and does not return, property acquired by the husband in this State during the absence of the wife will be community property. *Per Curiam*: We cannot say that, in discharging the duties of a mother at the place selected by her husband, she was rendering him no assistance.

Though a party have no authority to receive the funds of a succession or to pay its debts, yet if the funds of the succession have been applied by him as the law would have applied them, the heir will be bound by such payments, and he will be entitled to credit for their amount in a settlement with the heirs.

A receipt *sous seing privé* given to an administrator on the payment of an account, is not evidence that the account was due, if the fact of its being due be disputed.

**A** PPEAL from the District Court of Terrebonne, *Burk, J. W. Hall*, for the plaintiffs. *J. C. Beatty*, for the defendant. The judgment of the court was pronounced by

ROST, J. This is a suit to compel the defendant to account, as tutor of the minor children of *Emmor Moore*, deceased. The defendant filed an account, which was opposed by the plaintiffs, and upon that opposition a judgment was rendered in their favor for the amount claimed. The plaintiffs and defendant both appealed.

It is in evidence that the succession of *Emmor Moore* was opened in 1835, and that, shortly after, the defendant was appointed tutor *ad bona* to the minor heirs, *Jeffries Moore*, *Emily Moore*, *Mary Moore* and *Emmor Moore*, who were at the time in the State of Ohio, with their mother, the surviving wife of the deceased. After the death of *Emmor Moore*, and before the appointment of the defendant as tutor, *James Moore*, another minor heir, died. *Joseph H. Moore* and *Mrs. Jeffries*, were the only heirs of age. No administrator was appointed to settle the succession; but, on the application of the defendant, acting as tutor, the property was sold for cash to pay the debts, and the proceeds paid over by him to the heir of age, *Joseph H. Moore*, who bound himself to apply them to the payment of the debts.

In 1836, *Sarah W. Baker*, the surviving widow, was appointed guardian of

three of the minors, in the State of Ohio, and gave *Joseph H. Moore* a power of attorney to manage the affairs of the minors in Louisiana. *Joseph H. Moore* was himself appointed, in the State of Mississippi, guardian of *Emily Moore* the remaining minor heir. *Jeffries Moore*, subsequently died, leaving as his heir *Ella Moore*, who is represented by *Evelina Applegate*, her mother and tutrix. *Mary* and *Emily* subsequently married, and with the tutrix of *Ella*, are the plaintiffs in this suit.

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They allege that their father left, at his death, the undivided half of the plantation and slaves described in their petition as his sole property, his wife never having resided in Louisiana, and no community having existed between them; that the defendant caused said property to be sold, and received as the price of it \$28,847, of which they claim their portion, as heirs of their father and of their brother *James*. They pray that the tutor be made to account and pay over to them their respective shares, with interest. The answer states that the property was in community, that the succession of *Emmor Moore* being insolvent, a syndic should have been appointed by the creditors; but that instead of this, the defendant and *Joseph H. Moore*, constituted themselves syndics, without opposition from the creditors; that the defendant paid over the amount of the sale to *Joseph H. Moore*, who applied it faithfully to the payment of the debts of the succession, as appears by the account annexed to the answer.

The plaintiffs opposed the account filed on the following grounds; 1st. That *Moore* had no authority to receive the proceeds of the sale from the defendant. 2d. That the claims against the succession placed on the account as having been paid by *Joseph H. Moore*, were prescribed before such payment, if any there was; and, further, that they were prescribed before they were presented to the heirs. The plaintiffs also asked proof of the existence of a portion of the debts mentioned in the account as having been paid.

There were several bills of exceptions taken during the trial, one of which it is necessary to notice.

The witness *Jessie Batey* was offered to prove item no. 4 in the account, and his testimony having been objected to, on the ground that he was the surety of the tutor in his bond, the defendant applied to have the witness released from his obligations as surety, in order that he might testify in his behalf, and on condition that the said defendant should furnish new and sufficient security, in the amount required by law. The court granted the application, new security was given, and the court ordered that *Jessie Batey* be released. The counsel for the plaintiffs properly excepted to these proceedings. This is not one of the cases in which courts of justice have power to release a surety for the purpose of removing his disability to testify. The liability of the surety to the heirs for the previous maladministration of the tutor was fixed, and could be neither increased nor diminished by the act of the court.

The defendant took several bills of exception to the refusal of the judge to admit evidence offered by him. But as this evidence, if received, could not have changed the conclusions to which we have come, it is unnecessary to notice them.

On the merits, the first question presented to our consideration is, whether there was a community of acquets and gains between *Emmor Moore* and his wife. It is not denied that *Moore* resided in Louisiana; and the evidence shows that his wife came to this State, and, after remaining here a few months,

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went to the State of Ohio with her children, and did not return. It is contended by the plaintiffs' counsel that the property left in Louisiana by *Emmor Moore* was acquired by his sole exertions, unassisted by his wife, and belongs exclusively to his heirs. We are of opinion that the law, as well as the facts, of the case, are against that conclusion. As a general rule, the domicile of the wife is that of her husband, and she can have no other without a legal cause shown.

It is proved that the mother of the plaintiffs removed to Ohio, in conformity with the desire of her husband, on account of the superior advantages which he supposed that location to possess, for rearing and educating his children. We could not say that, in discharging the duties of a mother at the place selected by her husband, she was rendering him no assistance. The performance of those duties out of the State, cannot be made a pretext for cutting her off from her share in the community.

The claims against the succession were not prescribed, at the time they purport to have been paid by *Joseph H. Moore*; and, if the payments made by him on account of the succession were valid, the plaintiffs are bound by them. It is urged that those payments are not valid, because *Joseph H. Moore* had no warrant of law to receive the funds of the succession, or to pay its debts. It is true, he acted without authority; but, having acted, the first question to be determined now is, whether the funds were applied by him as the law would have applied them. Many things are forbidden by law to be done, which, when done, become valid and binding. Where courts of justice have any discretion, they will not disregard an illegal act, if they cannot do so without enabling parties to commit a fraud. On that ground married women and minors claiming the benefit of restitution for the illegal alienation of their property, must reimburse the sums received for it, when it is proved that those sums have accrued to their benefit. C. C. 2226. Without going into any inquiry as to the manner in which the payments were made, if the debts paid were due by the succession, the defendant must be credited with those payments in his settlement with the heirs.

We feel bound to state, however, that the proceedings of the defendant in this succession, have been extremely irregular, and that no credits can be allowed her for payments made, unless the existence and reality of the debts paid are placed beyond all reasonable doubt.

Items 5, 6, 7, 8, 9, 10, 11 and 12 of the account amount together to the sum of \$1,788 42½. These debts are not denied, and prescription is the only plea filed in relation to them. Prescription had not accrued when they were paid by *Moore*, and we have already said that this plea cannot avail the plaintiffs.

It is proved that the firm of *Hoops & Moore* was a creditor of the succession for \$25,087. This debt is acknowledged to have been paid, except a small balance, for which *Moore*, one of the partners, is bound to account to the firm. Items nos. 1 and 2 of the account were paid by *Hoops & Moore*, and are no doubt included in their claim. Item no. 3 is not proved. A receipt under private signature to an administrator in payment of an account, is not evidence that the account was due. Item no. 4 is not proved, and the testimony of *Jessie Batey*, offered in support of it, is inadmissible.

The defendant has proved payments to the amount of \$26,875 42. This sum deducted from the price of adjudication leaves a balance of \$1951 58, one half of which belongs to the heirs of *Emmor Moore*. Out of this half,

each of the plaintiffs is entitled to the sum of \$156 78, with interest from the 29th June, 1835, till paid, at the rate of five per cent per annum.

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It is, therefore, ordered that the judgment in this case be reversed, and that each of the plaintiffs recover of the defendant the sum of \$156 78, with interest at the rate of five per cent per annum, from the 29th June, 1835, till paid, and the costs of the District Court; those of this appeal to be paid by the plaintiffs and appellees.

### SUCCESSION OF HEBERT.

Where a surviving father claims to have the interests of minor children in property forming part of the community of acquets and gains adjudicated to him, and the adjudication is recommended by a family-meeting, the under-tutor alone has a right to oppose it in behalf of the minors. Relations of the minors have no right to interfere in such a case, on their behalf. In the event of a collision of interest between the father and natural tutor and the child, the duty of representing the minor is confided to the under-tutor.

**A** PPEAL from the District Court of Assumption, *Randall, J. Janin and M. Taylor*, for the appellant. *Mathiat*, for the opponent. The judgment of the court was pronounced by

**EUSTIS, C. J.** This is an appeal taken by *Rosemond Simoneau*, from a decree of the court of the Fifth Judicial District, by which a new appraisement was ordered of certain property which he owned in common with his minor children, who held in the right of their deceased mother. The appellant had claimed to have the interest of his children in the property adjudicated to him at the appraisement made in the inventory of the succession of their deceased mother, and a family-meeting had advised the adjudication. The effect of the decision appealed from is to defeat this adjudication, as demanded by the surviving husband at the original appraisement, a new one having been ordered, and another family-meeting being also ordered to deliberate on the interests of the minors touching the adjudication thus demanded by the father. It appears that the application for the adjudication was opposed in the District Court by the maternal uncle of the minor, who has appeared as appellee in this suit. His right to interfere as a party in the proceedings was contested by the appellant, on the ground of want of interest, and that the under-tutor was the only party competent to appear for the minors against the father, who was their natural tutor. The district judge however, overruled the objections, and on this opposition proceedings were had and evidence was taken which resulted in the decree of the District Court, from which this appeal was taken.

We think the opposition ought to have been dismissed, its allegations not having been sustained. We do not undertake to lay down any limit to the discretion of courts in protecting the property of minors from spoliation. The law gives ample powers to courts to effect that object. It supposes that their interests are safe in the hands of the tutor and under-tutor, acting under the supervision of courts; and we cannot recognize the right of relations to interfere, on all occasions, in the judicial proceedings between the father and the legal representative of the children. Those who take upon themselves to protect the property of children, ought to bear in mind that they have other

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interests besides pecuniary ones, and that their future welfare is dependant in a great measure on the good repute and well being of the father. The law in committing the interests of the child to the instinct of parental affection, has made the best provision for their protection; and, in the event of a collision of interest between the father and child, the duty of representing the minor is confided to the under-tutor.

We are led to make these remarks because the father is charged with fraud in the opposition made by the uncle, and because we find no ground for the accusation, and we believe the scandal of this suit will do great injury to the minors, and, on a deliberate view of their best interests, it were better that they had been left as the law has left them, to the good faith of the father and the supervision of the under-tutor. The adjudication of the common property to the surviving parent is not founded upon the narrow consideration of pecuniary advantage, but, as has been well observed by counsel, in the greatest good of the children. It enables the parent to continue the former business of the community, and secures to the children their home with all its associations.

Notwithstanding this opinion which we entertain, we are called upon to affirm or reverse the decision of the district judge. The judge was of opinion that the family-meeting was not properly composed, and refused to homologate their proceedings. Although the nullity resulting from this informality may not have been radical, yet, as we cannot say that the judge erred in refusing to act on their deliberations in confirming the adjudication, it is obvious that his decree must stand in this respect. As so much time has elapsed since the appraisalment, which was made on the 1st of February, 1848, there would be no propriety in disturbing the order for a new appraisalment at this time.

The judgment of the District Court is, therefore, affirmed, with costs; and it is further ordered that the opposition of *Drosin Hébert* be dismissed.

### MOURAIN v. DELAMRE.

Although in ordinary partnerships each partner is entitled to interest on all sums advanced by him, he cannot claim conventional interest on those sums without an agreement in writing by the other partners to pay it. The circumstance that conventional interest was charged in the books kept by the party who claims it, and in the accounts rendered by him to the plaintiff from time to time, cannot, in partnerships of this kind, be considered proof of such an agreement.

**A**PPEAL from the District Court of Pointe Coupée, *Farrar, J. Lacoste*, for the appellant. *Provosty and L. Janin*, for the defendant. The judgment of the court was pronounced by

**ROST, J.** This is an action for the settlement of accounts of an ordinary partnership formerly existing between the parties. The District Court gave judgment in favor of the defendant for the sum of \$2695, with legal interest, and the plaintiff appealed.

The accounts of the parties were, on the application of the plaintiff, referred to an auditor, who discharged his duties with great care, and made a lucid and well considered report. The plaintiff opposed it on various grounds, and upon that opposition the judgment appealed from was rendered. The following grounds alleged in the opposition, are insisted upon on the appeal: 1st. It is

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urged that the plaintiff was erroneously charged with one half the household expenses incurred by the defendant's family while she boarded and lived there. The defendant avers that these charges are made in conformity with her stipulations in the verbal contract of partnership existing between them, and that they were included in the accounts rendered by him to the plaintiff from time to time, and received by her without opposition being made to these items. Admitting, as contended by the plaintiff's counsel, that the first of these facts is not satisfactorily shown, and that there was no contract in relation to the plaintiff's expenses in the defendant's family, she was bound to pay her board, and the amount charged to her would certainly not exceed its value.

2d. The plaintiff complains that the defendant has been allowed \$887 56, without proof.

This item is made up of two notes of the plaintiff, each for the sum of \$173 50, which the defendant alleges he has paid, and of a variety of articles stated to have been procured by him for her private use. The notes and articles composing this item are found in the accounts rendered to the plaintiff. It is not shown that she ever objected to them, and it is in evidence that the defendant was in the habit of making purchases of that description, and paying debts for her. This acquiescence on her part, and this course of dealing establish, *prima facie*, the defendant's claim.

3d. The plaintiff avers that the judgment erroneously allows the sum of \$1133 25, for interest at the rate of ten per cent per annum.

We consider this ground well taken. The partnership existing between the parties was not a commercial partnership, nor were either of the partners merchants; and, although in private partnerships each partner is entitled to interest on all sums advanced by him, he cannot claim conventional interest on those sums without an agreement in writing of the other partners to pay it. The circumstance that the conventional interest was charged in the books kept by the defendant and in the accounts rendered by him to the plaintiff from time to time, cannot, in partnerships of this kind, be considered as proof of such an agreement. The interest must be reduced from ten to five per cent.

The objection that this, being a suit for the settlement of a partnership, the court cannot inquire into the private accounts existing between the partners, is clearly untenable, and the other errors alleged in argument were not specified in the opposition to the report of the auditor, and cannot be noticed.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant in reconvention, and against the plaintiff, for the sum of \$2128 37½, with legal interest from the 24th March, 1846, till paid, and the costs of the District Court; those of this appeal to be paid by the defendant and appellee.

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GAULDEN v. McPHAUL.

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In cases unattended with any of those circumstances which give rise to aggravated damages, the direct and immediate, or the natural and proximate, consequences of an act are alone to be considered, in ascertaining the responsibility for the commission of an act unauthorized by law. C. C. 1928 s. 2, 2294, 2304.

Where a deed was executed in another State, by which certain slaves were conveyed in



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trust to secure the payment of a note payable to the creditor or bearer, the slaves remaining in the possession of the debtor, the trustee cannot, in case of the removal of the slaves to this State, enforce the execution of the trust, nor take possession of the slaves, without proof of the debtor's being in default by the non-payment of the note. Without such proof the trustee would be responsible for any loss sustained by the debtor from a seizure of the slaves. *Per Curiam*: We must not be understood as recognizing the right of trustees to execute trusts created on slaves actually within this State, without the intervention of judicial proceedings.

**A**PPEAL from the District Court of Point Coupée, *Farrar, J. Ralliff and Cowgill*, for the plaintiff. *Cooley*, for the appellant. The judgment of court was pronounced by

EUSTIS, C. J. This is an action on the part of plaintiff against the defendant, to recover the value of a slave named *Albert*, alleged to have come to his death in consequence of the illegal, violent, and unwarrantable conduct of the defendant, in attempting, in company with two other men, to seize and carry off the said slave, with several slaves belonging to plaintiff, while engaged at work at a wood-yard near Port Hudson, in the parish of East Feliciana. The petition alleges that said *McPhaul*, with two other men, went to the wood-yard of the plaintiff, and attempted with force and violence to seize and carry away plaintiff's slaves, and so frightened them that *Albert* and several others ran off, and, in attempting to get home to the residence of petitioner, one of the said negroes died on the roadside, and the others, from the fright and fatigue, were greatly injured.

The defendant pleaded the general issue. In an amended answer the defendant alleged that, he had a right to seize and take possession of said slaves by virtue of a deed of trust, given by said plaintiff to *Francis Cooley*, of the said slaves, for the use and benefit of defendant, to whom said plaintiff was indebted in a large sum of money, and, by virtue of a power of attorney from said *Cooley* to defendant, empowering him to carry into effect said deed of trust, which was executed in Wilkinson county, State of Mississippi, on the 6th of November, 1848; that said slaves were removed from the State of Mississippi to this State, in order to defraud respondent of his just rights thereon, under the impression that they could not be seized under a deed of trust, etc.

There have been two verdicts for the plaintiff, and from the judgment in the last one this appeal is taken by defendant.

It appears that *Gaulden*, the plaintiff, with his mother, had established a wood-yard near Port Hudson, in the parish of East Feliciana, where he had a number of slaves under the management of *James Freeman*, who resided with his family on the premises. The residence of *Gaulden*, the plaintiff, was upwards of thirty miles distant, in the county of Wilkinson, State of Mississippi. On the 12th of March, 1845, the defendant, in company with *B. Buller* and *Wiley Dixon*, went to the house of *Freeman*, during his absence, for the purpose of taking several of the slaves of *Gaulden*, for which a deed of trust had been given by *Gaulden*, under which he was authorized to act, and attempted to take them. The testimony relating to the acts which constitute this attempt is not very definite, inasmuch as we infer from the testimony that the slaves took to flight on hearing that the defendant and his men came to take them. The slaves ran off, abandoned the place, and were next heard of at the residence of the plaintiff, with the exception of the slave *Albert*, who was found dead on the roadside in the direction of his master's residence on the day after the appearance of the defendant at the wood-yard. It appears also

that three other slaves who had thus fled, were injured from fatigue, so that they were unable to work for several days. The slave *Albert* was worth \$800, was young, healthy, and accustomed to labor. If the facts authorized the verdict, the jury were justified in assessing the damages sustained by the plaintiff, in consequence of his loss, at \$800.

We have not been able to discover that the defendant made use of any means of violence, or did any act calculated to produce alarm or terror, but his conduct and that of his attendants on the premises was that of a man attempting to exercise what he conceived to be a legal right.

In relation to the responsibility of the defendant for the loss of the slave *Albert*, it is obvious that the cause is remote from the effect. The mere fatigue of the journey on foot at that season of the year, to a slave of the age and constitution of *Albert*, is not a reasonable cause which can be assigned for his death. Nor does the alarm produced by the acts of the defendant, as contended by the counsel for the plaintiff, rest upon anything else but mere conjecture. It was within the power of the plaintiff to have established the cause of the death of his slave beyond any doubt, by a *post mortem* examination of his body. Those who testify to the death of the slave show that his body was examined externally, but no medical man has given any opinion as to the cause of the death; that of the other witnesses is entirely conjectural and unsatisfactory.

This case we consider unattended with any of those circumstances which give rise to aggravated damages; and, in this class of cases, it is a settled rule of our jurisprudence to adhere to the principle, that the direct and immediate, or the natural and proximate, consequences of the act are alone to be taken into consideration. See the cases of *Delery v. Mornet*, 11th Martin, p. 10. Civil Code, 1928 § 2, 2294, 2304. 6 Toullier, § 289. In proportion as the consequence of an act is remote the uncertainty of its being the cause is increased infinitely, of which the present case is a strong illustration. The alarm produced at the wood-yard among the slaves of *Gaulden*, may well have induced them to flee from those who attempted to take them; but the cause is entirely an inadequate one for their leaving their established working place, and going a distance of thirty miles to their master's residence. We cannot leave out of view that the cause of this journey may have been in the sense the slaves had of acting in the interest of their master, probably at his prompting, to save his property from the grasp of a determined and vigilant creditor. There is no evidence showing that the slave *Albert* ever saw the defendant, or those who accompanied him at the wood-yard; and we consider the evidence as not establishing that his death was caused by their acts.

The view that we have taken of the cause of the death of the slave *Albert*, and the exemption of the defendant from all responsibility in consequence thereof, applies to the right of the plaintiff to claim damages produced by the fatigue of the other slaves in their journey to their master's residence. But the plaintiff also claims damages for the interruption and disturbance of the labor of the slaves by the acts of the defendant, as heretofore stated. The defendant, as we have seen, alleges that he had a right to seize and take into his possession the slaves of the plaintiff which were at the wood-yard, under a certain deed of trust. The instrument offered in evidence in support of this allegation is a deed, bearing date the 6th day of November, 1843; it purports to have been made by the plaintiff on one part and *Francis Cooley* on the other part, both of the county of Wilkinson, State of Mississippi, where the deed was executed and recorded. The deed conveyed to *Francis Cooley* four certain slaves then being in the

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county and State aforesaid, for the benefit of the defendant in this suit, who was the endorser of the plaintiff's note for the sum of \$810, which was made at the time of executing the deed, and was payable to the defendant, or bearer, and was due on the 1st of March, 1845. To secure the payment of this note the deed of trust was executed, and it provided that, "in case the said *M. G. Gaulden* shall not pay and discharge the said note when it becomes due, then and in that case the said *Francis Cooley* is hereby authorized, upon giving three weeks public notice by advertizement in any one of the newspapers in the town of Woodville, to expose to sale, and sell and convey to the highest bidder, for ready money, the whole, or so many of the aforesaid negro slaves, as will satisfy and pay all the amount due on said note." The defendant held a power of attorney from the trustee, in which he was fully "empowered to take the said negro slaves wherever they may be found, for the purpose of carrying into effect and due execution the trusts mentioned in the deed aforesaid." It appears that the defendant, in his attempt to take these slaves, acted under the advice of counsel, who gave it as his opinion that the right to seize the slaves in Louisiana was identical with the right to take them in the State from which they were removed, and in which the deed of trust was executed.

The slaves were, at the time of the act complained of, in the peaceable possession of the plaintiff. There is no evidence concerning the note, the payment of which the deed of trust was made to secure, and which was payable to the defendant, or bearer; nor of its payment by either the defendant, who was the endorser, or the plaintiff, who was the maker; nor of any protest of the note, nor of any amicable demand made on the plaintiff for the amount. We have often experienced great difficulty in giving effect under our laws to instruments of this kind made in other States. According to our law, the defendant, in the execution of this trust, could have no right to take possession of the slaves, except in the contingency provided for in the deed. The plaintiff never having parted with the possession of the slaves, the trustee has no right to take them unless *Gaulden* placed himself in default by the non-payment of the note when it became due, and he cannot be held to be in that position until after an amicable demand made upon him. No court in Louisiana would permit the defendant to take the slaves under this instrument until after the default should have been established. It follows therefore that, whatever the right of the defendant may have been, he has not made out by evidence a justification of his attempt to take the slaves of the plaintiff, as complained of, on the 12th of March, 1845. Confining therefore our estimate of the injury done to the plaintiff to the interruption and disturbance of the labor of his slaves at the wood-yard, we do not feel ourselves authorized to assess the damages at a higher sum than \$100. In correcting the error into which the juries have fallen, we applaud the intention with which their verdicts were rendered. It does not appear that the rules which ought to have guided them in awarding damages were laid before them, and the error into which they have fallen was in the interest of the public peace, and against the right of any man to take the law into his own hands. We must not be understood as recognizing the right of trustees to execute and carry out the trusts created upon slaves which are in this State, without the intervention of judicial proceedings, as it is not necessary to examine that question in order to decide this case. We have examined the decisions referred to by counsel concerning the weight to be given to verdicts of juries, and have not come to the conclusion that the verdict in this case cannot stand, without the most mature consideration.

It is, therefore, ordered that the judgment of the District Court be annulled and reversed, and that the plaintiff recover from defendant the sum of \$100, with interest from this date, and costs of suit in the District Court, and that he pay the costs of this appeal.

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McPHAUL.

### MAYOR, &c. OF DONALDSONVILLE v. RICHARD et al.

No appeal will lie from a judgment rendered by the mayor of a town, for a sum under three hundred dollars, for an alleged infraction of an ordinance of the corporation, where the only question raised is as to the constitutionality of an act of the legislature vesting judicial power in the officer who rendered the judgment.

**A**PPEAL from a judgment rendered by the Mayor of Donaldsonville. *Duffel and Seghers*, for the plaintiffs. *Ilsey*, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal taken from a judgment rendered by the mayor of Donaldsonville for the sum of \$30, for an alleged infraction of one of the town ordinances. It is brought before this court under article 63 of the constitution, as stated by counsel.

The only question raised in this case is, the constitutionality of an act of the legislature vesting judicial power in the officer who determined it. This question does not give this court jurisdiction of the cause under that article of the constitution. See *Devron v. First Municipality*, ante p.

*Appeal dismissed.*

### BOUDREAU v. BERGERON.

Where a party sold to plaintiff a tract of land acquired from a third person, supposed to contain a certain quantity, and plaintiff afterwards re-sold, by public act, to his vendor a certain number of acres of this land, and the latter sold that quantity to defendant, and it is subsequently ascertained that the tract originally sold to plaintiff did not contain the quantity it was supposed to do, plaintiff cannot hold all the land that he would be entitled to, if there had been no deficiency. Whatever secret equities may exist between plaintiff and his vendor, the former cannot claim the benefit of them against a subsequent purchaser in good faith. Having placed on the public records the title on the faith of which defendant purchased, he must bear the consequences of having presented the rights of his vendor in a false aspect.

**A**PPEAL from the District Court of Lafourche Interior, *Burk, J. J. C. Beatty*, for the plaintiff. *W. Hall*, for the defendant. The judgment of the court was pronounced by

ROST, J. This is a petitory action. *Bourgeois* conveyed a tract of land to *Part*, who sold it to the plaintiff by two separate acts of sale, the first sale being for one arpent front, with the ordinary depth, and the second for the remainder of the land acquired from *Bourgeois*, supposed to contain one and three-fourths of an arpent front. Afterwards the plaintiff sold by public act to his vendor one and one-fourth of an arpent front of the same land, commencing

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| 4b     | 83   |
| 47     | 53   |
| 4b     | 83   |
| 48     | 1164 |
| 49     | 140  |
| 49     | 877  |
| 4      | 83   |
| Case 2 |      |
| 106    | 689  |
| 4      | 83   |
| Case 2 |      |
| 115    | 886  |

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at the upper line. *Part* sold this land to the defendant, also by a public act. It has been ascertained by a survey, that there is not two and three-fourths arpents front in the whole tract, as was supposed by the plaintiff, and he now contends that he is entitled to all he would receive, if there was no deficiency, deducting therefrom one and one-fourth of an arpent retroceded to *Part*, and that *Part*, or his vendor, can only take the remainder. The defence is a general denial, and an averment of title, under the sale from *Part*. There was judgment in favor of the plaintiff, and the defendant appealed.

The District Court appears to have considered the case as if the vendor of the plaintiff was himself the defendant in the suit. This is an error. Whatever secret equities may exist between *Part* and the plaintiff, the latter cannot claim the benefit of them against a subsequent purchaser in good faith. He has created, and placed upon the public records, the title on the faith of which the defendant has acquired. He must bear the consequences of having presented the rights of *Part* in a false aspect to the public. *Richardson v. Hyams*, 1 An. 286.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

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| 4   | 84  |
| 46  | 32  |
| 4   | 84  |
| 106 | 207 |

#### POLICE JURY OF WEST BATON ROUGE v. MICHEL et al.

*A fi. fa.* issued from a district court and levied on property within the jurisdiction of another district court, may be enjoined by the latter.

It being the duty of the police jury of each parish to provide a sufficient house for the courts and jurors, and a good and sufficient jail to receive and keep prisoners, where buildings have been thus provided by a parish for the State, and are used and occupied for public purposes, they are not liable to seizure and sale under execution against the police jury.

**A**PPEAL from the District Court of West Baton Rouge, *Burk, J. Bennett*, for the plaintiffs. *Lacey*, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. The sheriff on an execution issued on a judgment obtained by the plaintiff, *Jean Pierre Michel*, against the police jury of West Baton Rouge, in the District Court held in the parish of Pointe Coupée, seized and was proceeding to sell the court house and furniture, the clerk's office and furniture, and the recorder's office and jail of the parish of West Baton Rouge. An injunction was granted by the judge of the sixth judicial district against any further proceedings in relation to the property thus described, which was by judgment of the court made perpetual, and the defendants have appealed.

The defendants contend that the judgment on which the execution issued having been rendered by the District Court at Pointe Coupée, the District Court at Baton Rouge had no jurisdiction or authority to grant or maintain the injunction. This question we consider settled in the case of *Hobgood v. Brown*, 2 An. 323, and the cases there cited.

It being the duty of the police juries of the several parishes to provide a sufficient house for the courts of the State, with proper rooms for jurors, and a good and sufficient jail to receive and keep prisoners, it seems to us to follow that, when the buildings are thus provided by a parish for the State, and are

used and occupied for public purposes, they are not liable to seizure and sale on execution against the corporation of the parish, under the principles laid down by this court in the case of *Egerton v. The Third Municipality*, 1 An. 435.

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*Judgment affirmed.*

### HALL et al., Syndics v. WOODS.

Where one who purchased, in his own name, slaves sold at a judicial sale, applies to the Probate Court, alleging that he bought them as an investment of funds of minors to whom he was under-tutor, and praying for a family-meeting to consider the propriety of adopting and confirming the purchase on behalf of the minors, and they recommend its adoption, and that the under-tutor be authorized to execute his notes for the credit part of the sale, and the deliberations are homologated and the under-tutor authorized to execute the acts, but, on the next day, he subscribes notes and consents to a mortgage in his own name, without mentioning these proceedings, the minors will not be bound thereby. *Per Curiam*: The purchase having been made by the party in his own name, there was no contract to ratify; the alleged ratification was a sale from the under-tutor to the minors; and article 1788 C. C. is inapplicable to such a case.

A minor will not be bound by a purchase, though ratified by a family-meeting whose deliberations have been homologated by the court, where the purchase exceeds his available means, and instead of being an investment is a speculation which may involve him in debt and difficulty.

**A**PPEAL from the District Court of West Baton Rouge, *Burk, J. Phillips*, for the appellants. *Lacey*, for the defendant. The judgment of the court was pronounced by

ROST, J. At the syndics' sale of the property of the insolvent *Ananias Dunbar*, made on the 22d December, 1841, *John Holmes* purchased slaves for the aggregate sum of \$12,110, payable one-tenth of the purchase money cash, and the balance on a credit of one, two and three years, with interest at the rate of ten per cent per annum, after the maturity of the respective instalments. Six days after the purchase he filed a petition in the Court of Probates, alleging that he had purchased those slaves as under-tutor of the minor children of the insolvent, and as an investment of a portion of their rights in the succession of the late *Jane Martin*, their mother. He prayed that a family meeting be convened for the purpose of taking into consideration the propriety of adopting and confirming this purchase, in behalf of the minors. The prayer of the petition was that the under-tutor be authorized to give his notes in behalf of the minors for the slaves purchased, and that the said minors be bound thereby. On the 10th January, 1842, a family-meeting was convened, who declared that the purchase was for the best interests of the minors, and necessary for their maintenance and education. They recommended that it be accepted, and the under-tutor authorized to execute his notes as prayed for.

On the next day, the deliberations of the family-meeting were homologated by the court, and *John Holmes* was authorized to execute notes for the price of the slaves, in his capacity of under-tutor. On the following day, he subscribed notes and consented to a mortgage in his own name, without making any mention of these proceedings. All the slaves purchased but one, were then delivered to the father and tutor of the minors, and have remained in his posses-

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sion ever since. No part of the price has been paid, and the plaintiffs now sue the defendant, who is one of the heirs of *Jane Martin*, for her share of this indebtedness.

The defendant denies her liability, and pleads want of consideration. She further alleges: 1st. That *John Holmes* bought for his own use and benefit, and that the slaves became and have remained his property. 2d. That if he had purchased as under-tutor, the sale would be void for want of authority in an under-tutor to make such purchases. 3d. That the purchase could not be ratified by a subsequent family-meeting, and that, if it could be, the family-meeting relied on is illegal, null and void. On the issue thus formed, the District Court gave judgment in favor of the defendant, and the plaintiffs appealed.

*John Holmes* was authorized by the Court of Probates to execute notes for the price of the slaves purchased in his capacity of under-tutor; but he did not comply with the decree. Nothing shows that the notes sued upon were given in execution of it. The purchase having been made by him and in his own name, there was no contract to ratify. The alleged ratification was in fact a sale from the under-tutor to the minors. We are satisfied that art. 1788 C. C. is not applicable to a case like this, and that this sale was not susceptible of ratification.

But the record shows another fact, which entitles the defendant to relief. The amount of the purchase exceeded the available means of the minors, and brought them in debt to the syndics. Neither the family-meeting, nor the Court of Probates, appear to have enquired into the extent of those means. But they manifestly took it for granted that they were sufficient to pay the price. In the language of our predecessors, in the case of *Darse v. Leaumont et al.*, 5 Rob. 287: "An investment of funds belonging to the minors was intended to be ratified, and not a speculation which might involve them in debt and difficulty." We concur with the court in that case that, minors are not bound by such speculations.

It is alleged that the slaves are in the possession of the minors, who should have tendered them, before they can be permitted to repudiate the purchase. It does not appear that the defendant, after she became of age, received any of them from her father. She cannot therefore be required to return them. If it be true, as alleged on the other side, that the minors were supported and educated out of the hire and labor of those slaves, the under-tutor has his action for indemnity. We are of opinion that the plaintiffs have failed to show the *stipulation pour autrui*, under which they claim.

*Judgment affirmed.*

HALL et al., Syndics v. WILLIAMS et al.

APPEAL from the District Court of West Baton Rouge, *Burk, J. Phillips*, for the appellants. *Lacey*, for the defendants. The judgment of the court was pronounced by

ROST, J. This case is similar to that of the same plaintiffs against *Woods*, just determined, and, for the reasons therein given, it is ordered that the judgment be affirmed with costs.

## LOUIS et al. v. RICARD et al.

In an action for freedom a judgment rendered in a similar suit by a brother of plaintiff against the same defendants, establishing his freedom, on proof that his mother and grand-mother were free long before the birth either of plaintiff or his brother, is not admissible in evidence. The judgment has not the force of *res judicata* as to the plaintiff, who was no party to it. The authority of the thing adjudged takes place only with respect to what was the object of the judgment, which was the freedom of the brother.

A judgment admitted to prove *rem ipsam* establishes nothing more than that such a judgment was rendered.

**A** PPEAL from the District Court of Iberville, Penn, J. David, for the appellants. Labauve, for the defendants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action for the freedom of Jean Louis the son of Dauphine, both of whom are the plaintiffs in this suit and who sue in *formd pauperis*. Dauphine is a mere nominal party. They were non-suited in the District Court, and have appealed.

The district judge considered the evidence adduced not sufficient to support the action, and in this opinion we concur.

The plaintiffs offered in evidence a judgment of this court, rendered on the 24th of May, 1847, by which it was decided that Edward, a younger brother of the plaintiff Dauphine, was free, on the proof that the mother as well as the grand-mother of Edward were free in the Islands of St. Domingo and Cuba long before the birth of either of the sons. In that suit Edward and the present defendants were parties, but the judgment in favor of Edward is not *res judicata* in favor of the present plaintiff Jean Louis, who was no party to it.

Article 2265 C. C. provides that the authority of the thing adjudged takes place only with respect to what was the object of the judgment rendered. The object of the judgment rendered in the case of Edward was his freedom, of which the freedom of his mother was the evidence. The judgment in that case was not admissible in evidence in this; as it was offered and received to prove *rem ipsam*, it establishes that such a judgment was rendered, and nothing more. Pothier, on the authority of *Res Judicata*, § 43. The testimony of the witnesses is far from establishing the freedom of the plaintiff.

*Judgment affirmed.*

HEPBURN et al. v. COMMISSIONERS OF THE EXCHANGE AND  
BANKING COMPANY OF NEW ORLEANS, et al.

An act of the legislature authorizing the reduction of the stock of a bank to the amount paid in at a certain period, accepted by the stock holders, will exonerate the latter from any liability beyond the amount of the reduced stock, as to creditors who have become so since the reduction.



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The date of a bank note is no evidence, even against the bank, at the period at which it became the property of the holder; nor can a subsequent holder claim to be vested with the rights of the first holder, so as to consider the debt due to him as dating from the period of the original issue.

Though the date of an ordinary written obligation to pay money is evidence of the date of the origin of the debt, the rule does not apply to bank notes.

Where the note of a bank is re-issued in the course of its daily business, the obligation of the bank is fixed by the re-issuing of the note; the date on its face is of no moment.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Grymes, Sigur and Bonford*, for the appellants. *L. Pierce*, for the commissioners. *Livingston, Maybin, Roselius, L. Janin, S. L. Johnson, Benjamin and Micou*, for different stock holders. The judgment of the court was pronounced by

EUSTIS, C. J. In 1839, the legislature passed an act to relieve the banks of the State, which had incurred the forfeiture of their charters by a suspension of specie payment, from said forfeiture. In the act it is provided that such of the banks as have not their capital stock paid in, may suspend the payment of the stock until the 1st day of February, 1841, and that the amount actually paid in at that period shall be deemed the capital stock of said banks, and they are hereby restrained from doing business on any larger amount of capital under the rules prescribed by their charter. Act of the 14th March, 1839, s. 2.

The charter of the Exchange and Banking Company was adjudged to be forfeited by a judgment of the late court of the First Judicial District, on the 15th of March, 1842. The plaintiffs are holders of \$34,710 of bank notes of this company, which came into their possession subsequent to January 1st, 1843, and the object of this suit is to make the original stock-holders, several of whom are made defendants, liable for the bank notes on which this action is brought.

It is admitted that the defendants have paid all the installments called in by the directors up to the time fixed by the act of 1839, to-wit: February 1st, 1841. Having thus contributed all they were bound to contribute to the capital as reduced by the act of 1839, the question presented is, whether they are liable in the present case beyond that amount, by reason of their obligations resulting from their ownership of the stock. The district judge was of opinion that they were not so liable, and gave judgment for the defendants. The plaintiffs have appealed.

The argument of this cause has been very elaborately prepared on both sides, and we have come to a conclusion which confines the subject within a very narrow compass, under the view presented by the district judge.

The first point to be ascertained is, as to the precise rights of the plaintiffs as the holders of bank notes which they have acquired since the forfeiture of the charter in March, 1842.

It is admitted that the act of 1839 was accepted by the banks, and it is obvious that, as far as legislation and the consent of the bank can make that act binding and obligatory, it has become so to all its legal intents. It was held by the Supreme Court, in the case of *Millaudon v. The Carrollton Bank*, 3 Rob. 507, that the act of 1839 did not diminish any of the original liabilities of the stock holders, and that they still remained contingently liable for the full amount of their subscriptions; but, that for the purpose of banking, the capital stock as it stood reduced by that act was not to be changed. Although we have not been able to concur in this opinion of the Supreme Court as to the principal

question which it decided, yet, so far as the opinion asserts the principle that the original liability of the stock holders to the creditors at that time was not impaired by that act, we concur in it. But we cannot continue in its extent their liability to subsequent creditors, without denying the power of the legislature to reduce the capital of a bank, the bank itself consenting to the reduction. The capital of those institutions was frequently increased on their application, and we see no objection to its being diminished with their consent. The effect of the act of 1839, as limiting the capital of the banks, was considered in the case of *Purton et al. v. The Carrollton Bank*, 3 An. 31, and settled by the decision given.

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Considering, therefore, the act of 1839 as fixing the amount of the capital of the bank to the amount paid in on the 1st February, 1841, as the defendants have paid their *quotas* up to that period, they are not liable to the creditors of the bank whose debts have been created since that period. Supposing them to remain under their original responsibility as stock holders to the creditors of the bank before the reduction of its capital, are the plaintiffs, by virtue of the bank notes which they hold, invested with the rights of such creditors.

A large proportion of these notes bear date in the year 1836, and it is contended by counsel that as to the origin of the debt itself the date is conclusive, and that there is no other mode of ascertaining when the notes were put in circulation except by referring to the dates. As the case is before us, the plaintiffs present themselves as the holders of the bank notes. Their dates are the only evidence of that of their origin; and the plaintiffs contend that the notes constitute a debt contracted by the bank in favor of the first holders, whose rights are vested in them.

By the third section of the act of 1839, the banks of New Orleans were bound to settle and pay the balances due each other every monday morning in gold and silver, and once a month were to publish a statement of their circulation, deposits, &c. The Exchange Bank continued its banking business until March, 1842, when it ceased to redeem its notes, and up to that time received and paid them out daily without memorandum of date or amount, or any notice being taken of the date of the re-issue. In pursuance of the act of 1839, the banks made weekly settlements up to March, 1842, in which the notes of each bank received by the others were returned to the bank of issue, and the balance ascertained and settled by the check of the settling clerk; the Exchange Bank accordingly received its own notes and paid them out without any alteration of dates.

However true it may be that in ordinary written obligations to pay money their date is evidence of the time of their origin, no authority has been shown which would justify its application to bank notes. They constituted the principal part of the currency at the time of the enactment of the laws concerning the banks of New Orleans.

Those laws were enacted under an emergency of great public embarrassment, in which the government of the State undertook to regulate the currency as a measure required by the necessity of the occasion. The very fact of the notes being currency excludes the conclusion of their date being material, and would defeat their uses as currency. No person would take a note as money if it were subject to the rules of pecuniary obligations, and subject like them to the laws of prescription. Indeed our Code has an express article ex-

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exempting bank notes from the operation of the prescription applicable to notes payable to order or to bearer. Article 3505.

Where the notes of a bank are re-issued in the course of its daily business, the obligation of the bank is fixed by the re-issuing of the note; the date on its face necessarily becomes a matter of no moment, and affords no index to the time of the origin of the obligation of the bank; and the legislation of 1839 and the action of the banks under it just noted, exclude any possible inference of the time of their issue of bank notes being deduced from their date.

It follows, therefore, that, the plaintiffs, having come into possession of the notes sued on subsequently to the 1st of January, 1843, there is no evidence of the notes being debts of the bank previous to the reduction of its capital under the law of 1839. That they were so originally the date imports, but once paid into bank after the reduction of the capital they were extinguished, and the obligation of the original stock holders could not be revived by their re-issue, the bank with its reduced capital being only bound by such re-issue.

These views we take to be in accordance with that in which the law considers bank notes according to the highest and best approved authorities. "Bank notes," says Lord Mansfield, in the case of *Miller v. Race*, 1 Burrow's Rep. 452, "are not goods, not securities or documents for debts, nor are they so esteemed, but are treated as money—as cash, in the ordinary course and transaction of business by the general sense of mankind, which gives them the credit and currency of money to all intents and purposes." *Keith v. Jones*, 9 Johnson, 120. *Judah v. Harris*, 19 Id. 145.

We therefore concur with the district judge in the opinion that, the stock holders who are defendants in this case are not liable to the plaintiffs; and, such being our opinion, it becomes unnecessary to notice any of the other points raised in the defence.

*Judgment affirmed.*

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| 4  | 90  |
| 46 | 567 |
| 4  | 90  |
| 47 | 923 |
| 4  | 90  |
| 48 | 84  |

### PACKWOOD v. DORSEY.

In an action for the slander of title to property judgment may be rendered ordering the defendant to institute, within a certain period, a suit to establish his pretensions to the property, and this judgment, on the failure of the defendant to comply with it, will stand to the plaintiff as a perpetual default of the defendant; but the court has no power to fix a term within which the defendant must set forth his title or institute suit, under the penalty of being forever after precluded from asserting his claims.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. Hennen*, for the plaintiff. This action is founded upon the law, *Dif-famari*, Justinian Code, lib. 7, tit. 14, l. 5, and not upon Partida 3, t. 2, l. 46; though the latter is a mere translation of the former. Such it is stated to be in 2 Elizondo's *Practica Universal Forense*, p. 136, ed. 1787. Gregorio Lopez, in his commentary upon the above law of the Partidas, states that it has been derived from the same source. In fact it has been the law of all the nations of Europe where the civil law prevails. It is as old as the time of Azo, who wrote a century before the compilation of the Partidas, in 1242. *Summa Azonis*, p. 722, 726. It is true that this law originally referred only to cases of liberty, and gave the right to every freeman ("ingenuus") to institute suit against any one defaming his "status," or rights to liberty. But it has been extended by analogy to cases affecting real or immovable property; and every man in possession of real estate is enabled to institute this suit against another

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claiming any right or title to it. The form of conducting such suit may vary among the different nations of Europe, but the form of the petition, the manner of conducting the suit, and all the incidents connected with it, are copiously laid down in the books of practice used in Spain. See 2 Elizondo, 135, 137. Paz, Praxis, tom. 3, p. 82, 84. Villadiego, p. 335, 387. Perez, tom. 1, p. 596. Prælectiones in Cod. lib. 7, tit. 14. Corvini Jurisprudentiæ Romanæ Summarium, 510, in Cod. lib. 7, tit. 14. 4 Merlin's Répertoire, (verbo Diffamari) 586. Leyser, tom. 2, p. 138, specimen 81. Meditations ad Pandectas. 6 Mulleri Promptuarium, p. 161, verbo. Provocatio ex lege Diffamari. Voët, in Pand. lib. 5, tit. 1, nos. 21, 22. In the english courts of chancery a remedy analogous to this of the civil law is found in their bills of pence. 2 Story's Eq. Jurisp., p. 174, 181, ss. 850, 860.

The principles laid down by the civilians on this subject may be found in 2d Leyser, p. 142. " \* \* \* testanturque, D. D. tantum non omnes in hoc processu pro diffamante haberi, qui jus sibi aliquid contra alterum asserti seu publicè hoc sibi privatim fiat. Omnis ergo inquietatio diffamatio est. Ita Barbosa in Thesauro, lib. 4, cap. 32, § 3. Quoties, inquit, alicujus interest defendi famam, bona, possessionem, remedium L. Diffamari obtinet, ideo comparatum, ut talia serventur ab omni inquietatione secunda." This action can be maintained although no injury has resulted from the act, the object being principally to quiet the title. "Provocatio ex L. Diffamari institui potest, tametsi diffamatio injuriam nullam contineat." 6 Mulleri Promptuarium, p. 164, n. 10. "Nam ut injuria diffamationi insit, necesse non est." Leyser, Meditat. ad Pandect. vol. 2, p. 139.

It is admitted that the common law remedy of an action for the slander of title does not go as far as the civilians have carried the above remedies. But the common law has no binding force on us. And though the same be true of the civil law, the principles of the civilians are more conformable to natural law and reason, and more consonant with equity. And, if all the spanish and civil law has been repealed, yet our courts are required, "in civil matters, when there is no express law, to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent." C. C. art. 21. Now the usages of the civil law, as interpreted in Spain and other nations of Europe, have been generally received in Louisiana. And if we appeal to natural law and reason on this subject, there can be nothing inequitable in the manner of the proceedings which the civilians have pointed out for the redress of such injuries as those set forth in the plaintiff's petition. Admitting that the roman and spanish laws have been fully repealed, "we presume," says Judge Mathews, "it cannot be viewed as a judicial offence to resort to them in aid of interpretation." *Lewis v. Casanave*, 6 La. 442. The same judge, afterwards in *Boismare v. His Creditors*, 8 La. 319, said that "the repeal of these laws by the act of 1828 as laws absolutely obligatory in the administration of justice ought not to destroy the force of principles which were established by them, when these principles are found to comport with justice." And the court, in the judgment of the case, proceeded on a very rigorous positive law of Spain, to condemn the defendant as guilty of fraud, because by the spanish law all insolvent debtors are presumed fraudulent.

To what extent the spanish and roman laws were repealed by the act of 1828 has not been precisely fixed by the decisions of the Supreme Court. Mathews, J., in delivering the opinion of the court, in 6 La. 441, says of this repealing law: "The clause of repeal is sweeping in its effects, *tremendously sweeping*; and an unwise or inconsiderate interpretation on the part of the courts of justice would have left the community without any civil laws except those contained in the Louisiana Code and Code of Practice, an evil so great as to be irreconcilable with the wisdom that must be conceded to our legislature."

In the case of *Carlin v. Stewart*, 2 Rob. 76, cited by defendant's counsel, the court considered it "useless to inquire whether the repeal of the civil laws extended to any other but statutory laws," and the question of slander of title was not even hinted at, the suit relating simply to slander of the person. The case of *Caldwell v. Hennen*, 5 La. 24, also cited by defendant's counsel was the same in its method of proceeding as that of *Heerman v. Livingston*, 9 M. R. 656, and although instituted subsequently to the repealing act of 1828, neither the counsel nor the court called in question the correctness and legality of the proceeding.

The counsel for the defendant urges that the judgment in this case as-

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sumes a legislative power of giving a prescription against the action of defendant. No such power was intended to be assumed by the court in this judgment. The defendant was indulged, in consequence of his willingness and intention to institute a suit, with time for that purpose. The plaintiff might, with great propriety, complain that the judgment granted the defendant too much, as the action had already been pending against him nearly a year.

It is clear that the suit which the defendant was ordered to institute, was that mentioned in the plaintiff's petition, viz: that of his personal claim upon the property of the plaintiff. The judgment can have reference only to the plaintiff's demand, and the defendant could not be compelled under it to do more than the plaintiff asked. The defendant was sued individually, and not as tutor of his children, and it was to preclude his individual action only, that the suit was instituted.

To recover damages for a slander of title, proof of malice may be necessary. But that question cannot be brought up here, as no damages were given.

In the case of *Wulden v. Peters*, 2 Rob. 337, quoted by the defendant, the court correctly remarks: "The principal object of such a suit, according to the spanish law from which we derive it, is to quiet titles, or to compel the defendant either to waive all right, or to institute a suit and thereby enable the plaintiff to make good his title. Whenever there is a waiver of title that object is attained. "The object of the law," says this court in the case of *Livingston v. Heerman*, was to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion; to force the defamer to bring suit, and throw the burden on him of proving what he asserted." 9 Mart. 714.

*Henderson and Prentiss*, for the appellant. The judgment condemning defendant to institute suit within one month, or, in default thereof, to be forever enjoined from making any pretension to the property in dispute, exceeds the power of the court. The fixing of a prescription to an action is a legislative, and not a judicial, function. The legislative and judicial powers are separated by the constitution. The 46th law, tit. 2, of the second Partida, on which this action is based, is repealed. See sec. 25 of the stat. of 1828. C. C. 3521. This law 46, even if in force, is confined to matters affecting personal rights, as where one person proclaimed another to be his slave, or defamed his character.

The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff, alleging himself to be the owner and in possession of a valuable plantation in the parish of Plaquemines, with the slaves thereunto belonging, complains that *Greenberry Dorsey* has slandered his title, by giving out to divers persons that he had an interest in said plantation and slaves, or that he had a right to a portion, or was part owner thereof. It is alleged that *Dorsey* had no right, title or interest in any portion of the plantation or slaves, and that the declarations thus made by said *Dorsey* were made maliciously, and for the purpose of disturbing the petitioner's right of property and preventing his disposing of the same. The prayer of the petitioner is for the payment of \$5,000, damages alleged to have been suffered by the acts of the defendant, and that the defendant be decreed to produce his titles, if any he have, in support of his claims to the said plantation and slaves, and to prosecute suit thereon to final judgment, and, in default thereof, that he be forever enjoined from setting up said claims or bringing an action thereon, and that the plaintiff be decreed to be the sole owner of the plantation and slaves, free from all claim on the part of said *Dorsey*. It concludes with asking for general relief. This petition was filed on the 24th February, 1846.

The defendant pleaded the general issue, and denied expressly that he had ever slandered the plaintiff's title, but alleged that he had only taken measures to exercise his legal rights and claims to said property, as well in his individual capacity, as in that of tutor of his minor children, and that he was about to institute legal proceedings against the plaintiff for the purpose of establishing his rights. He prayed to be hence dismissed, and also for general relief.

The cause was at issue on the 9th of March, 1846, and judgment was rendered on the 4th of March, 1847. The court, considering that the plaintiff had

a right to have the doubts created by the defendant's acts respecting his title to the property in question cleared up, gave judgment for the plaintiff, and decreed that the defendant be condemned, within one month from the date of the judgment, to institute the suit stated in his answer, or in default thereof that he be forever enjoined from making any claim to said property, and that the defendant pay costs.

It appears that, long after the term thus fixed for the institution of his suit, *Dorsey* filed his bill in chancery against *Packwood*, in the Circuit Court of the United States for this district, for the recovery of his interest in the plantation and slaves, and that *Packwood* has pleaded this judgment in bar of *Dorsey's* right of action.

It becomes, therefore, necessary to decide on the validity of this judgment. This is an action of jactitation or slander of title. Actions of this sort have several times been recognized by the Supreme Court, since the repeal of the spanish laws by the statute of 1828, and their utility in quieting titles and preventing the disturbance of owners by the putting forth unfounded claims to their property, we believe is unquestionable. In these cases the question has never been raised as to the power of the court to fix a term within which the defendant is compelled to set forth his title or institute his suit, under the penalty of being forever after estopped from asserting his claims, the court having tried and decided the issue of title tendered by the defendants. It is to this part of the judgment of the District Court that the argument of counsel has, on both sides, been directed.

It appears from the forms contained in the spanish books of practice, referred to by the counsel for the plaintiff, that in Spain judges were in the habit of fixing a term within which a person setting up a title to property in the possession of another was bound to institute his suit, under the penalty of perpetual silence. Whether such a judgment was final in all cases, or whether there was any relief afforded against it, we do not find stated in the works referred to by counsel. It appears that these judgments rested for their legality upon no legislative sanction, nor any recognized principle of the civil law, but entirely on an extension of a law of the Code of Justinian known as the law *Diffamari*. By this law, whoever defamed the condition of a person born free, could be compelled to exhibit his proofs and make them good in a court of justice, and in default thereof be condemned to perpetual silence in relation to the slander. The dignity which the law attached to the condition of a roman citizen, and the protection which it threw over the personal rights of all those subject to its dominion, explain at once the purpose and policy of this salutary provision. It was in derogation of the general principle *In vitus agere et accusare nemo cogatur*, and was enacted in the interest of public order, and for the maintenance of public peace among the different classes and races of the empire. An action was also given by a rescript of the Emperor Diocletian to a tutor, in case his former pupil had accused him of retaining the funds of the latter, in order to compel the pupil to institute his suit for an account.

Merlin says that the greater portion of the interpreters of this law, *Diffamari*, have extended it to slanders of the title of property, and to cases in which a party publicly claimed to be a creditor of another, and that this interpretation is in conformity with the spirit of the text. It must be admitted, however, he adds, that, "learned jurisconsults, such as President Favre, Henrys and Duperrier, have resisted with great force the extension of this

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law *Diffamari*." In the text of the spanish law, the singleness of the law *Diffamari* appears to have been adhered to, and the law not to have been extended beyond cases in which the character of the person, the *status*, or condition of the party, is assailed.

No person can be compelled against his will to sue another, unless in certain particular cases wherein the judge may by law oblige him to do it; as where a man publicly says another is his slave, or defames him in the presence of other persons. In these and other like cases, he who is defamed may petition the judge to oblige the defamer to bring a suit and prove what he said, or to retract or to make such reparation as the judge shall deem just. Partida 3, tit. 2, law 46. Gregorio Lopez in his commentary extends this law to disturbances of titles to property by slander.

This action being recognized as a part of our jurisprudence, are we bound, in the exercise of it, to all the incidents to which under the spanish practice it was subjected? The repeal of the spanish laws by the act of 1828 is an answer to this question. At the same time that we are at liberty to adopt any rule in furtherance of the object of the action, and not contrary to our own Code of Practice, which the experience of courts of the civil law has proved to be necessary, we cannot recognize a proceeding which has never been acted upon in our courts, and which is in direct conflict with principles we consider elementary. The law itself fixes the limitation within which actions can be brought. The power which is assumed in the decree appealed from of fixing the term of one month within which *Dorsey* is compelled to bring his suit, under the penalty of losing his right of action, is in direct conflict with the law of prescription.

We do not find that this practice of depriving the party of his right of action in default of bringing suit, which the spanish courts impose, is followed in other countries in which the civil law prevails.

Merlin himself puts the question, whether the defamer after being condemned to perpetual silence in consequence of not having instituted his suit within the term fixed by the judge, can have relief against this sentence, and be permitted afterwards to assert his rights. Wassenaer, Sola and Voët contend that he can, provided his demand in restitution be founded on a probable cause, as on his ignorance, at the time of being condemned, of the existence of certain proofs and facts material to establish the justice of his claims. But in this opinion Merlin does not concur, and thinks it is founded on a practice peculiar to courts in Germany, and that the restitution in a case like this ought to be confined to those causes which authorize the "*requête civile*."

Müller, in his Promptuarium, tit. *Provocatio ex lege Diffamari*, s. 17, says that, if the defendant confesses the slander, and avers himself willing to institute his suit, \**duplex terminus saxonicus ei concedi solet, sub pœnâ perpetui silentii*.

Voët states that one citation is not sufficient to authorize the decree of perpetual silence. Two at least, and sometimes three or four are considered necessary, before the party is condemned on his default. Voët ad Pandectas, lib. 5, tit. 1, s. 24. These discrepancies in the application of this extraordinary remedy result undoubtedly from the different modes of practice which prevail in different countries: but their existence shows the reluctance of courts in

\**Hodie simplex*. Vol. 6, p. 165, Editio Leipzig.

concluding a party for ever by fixing absolutely a term during which only his rights can be exercised, and a disposition to avoid such a result.

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In the jurisprudence of France, we have found no case in which a decree of this kind has been rendered against a party.

It seems to us that it is impossible to carry out the law *Diffamari* in its extension to all cases as maintained by the spanish writers, and the safest rule for us is to adhere to its original intendment and policy. In an action for the slander of title to property we see no reason why a judgment should not be rendered, ordering the defendant to institute his suit in order to establish his asserted pretensions to the property which he may set up. This judgment will stand to the plaintiff as a perpetual default of the defendant. But we know of no authority on the part of the court to fix any term, within which the party can be compelled to assert his rights under the penalty of being deprived of them. There are cases in which we have allowed the debtor to become the actor in a suit, but we do not consider that those cases affect the question decided in this.

The action for damages to which every one who injures another in his person or estate is liable, will we believe continue to be, as it has been, a sufficient protection for property against slanderers of title. No damages have been given by the judgment in this case, and none are asked in this court.

We have been referred by counsel to the proceedings in courts of Chancery on bills of peace, but we find nothing in them which supports the part of the decree to which our inquiries have been directed.

The judgment of the District Court so far as it condemns the defendant within one month from date to institute his suit against the plaintiff, or in default thereof to be forever enjoined from making any pretention to said property, we think unauthorized by law.

The judgment of the District Court is, therefore, avoided and reversed; and it is ordered that judgment be rendered for the plaintiff against the defendant, and that the defendant institute the suit by him mentioned in his answer, and pay the costs of this suit, the plaintiff paying the costs of this appeal.

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### GALBRAITH et al. v. DAVIS.

Where, under an agreement to sell merchandize, delivery is obtained by fraudulent pretences, the possessor acquires no interest that can enable a creditor of his, who seizes the property, to hold it against the true owner.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridga, J.* The judgment of the lower court in this case, was in these words:

"Without recapitulating the facts it is sufficient to say that, in the cases of *Gasquet v. Johnston*, 2 La. 514, and *Parmelee v. McLaughlin*, 9 La. 436, it has been fully settled that, under a sale of property where delivery has been obtained by fraudulent pretences no such interest passes as enables a seizing creditor to hold against the vendor. The same principle has been recognized in 3 La. 252, 15 La. 350, and is declared to be a rule of the common law, in 3 Kent's Comm. 407. See also *De Wolf's* case, in Mason's Reports.

"To secure the payment of the purchase money in this case, *Davis* deposited with the intervenor a receipt for a bill of lading for seventy-five tons of



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pork or bacon, lodged in the hands of *Ferriday & Co.* Of the existence of this merchandize there is no other proof than the declaration of *Davis*; and from the testimony touching his actings and doings, I am of opinion it never did exist. If it did, the same proof shows that he diverted it from its destination, and disposed of it elsewhere; and in either case a fraud was perpetrated on the vendor. It is unnecessary to decide in whose possession the property attached was at the time of the seizure. It is, therefore, ordered that the property attached be restored to the intervenor, and that there be judgment in his favor, with costs." The plaintiffs appealed.

*Frazer*, for the appellants, cited 12 Pickering, 76, 81. 13 Ibid. 175. 2 Hall's S. C. R. 527. 1 Greenleaf, 378. *Mott*, on the same side. *Preston*, for the intervenor, relied on *Ford v. Ford*, 2 Mart. N. S. 574. 9 La. 436. 2 La. 514. 9 Rob. 525. Civ. Code, arts. 2433, 2463, 2464, 2539, 3190, 3196. The judgment of the court was pronounced by

EUSTIS, C. J. For the reasons assigned by the district judge, it is ordered that the judgment of the court below be affirmed, with costs.

### LANDRY v. PETERSON et al.

Where a slave sold on the 5th, was found to be seriously ill of a typhus-fever on the 7th of the month, of which he died on the next day, the disease will be presumed to have existed at the time of the sale, in the absence of evidence that, though subsequently developed, it did not exist at that time. C. C. 2508.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Griffon*, for the plaintiff. *Peyton*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The object of this action is to get back the price paid to defendants by the plaintiff, for a slave. The slave was bought on the 5th February, and was found to be sick on the afternoon of the 7th. A physician who was immediately called in, pronounced the disease typhus fever. The slave died on the morning of the 8th. The district judge decreed the restoration of the price, and the defendants appealed.

The district judge was satisfied upon the question of identity; and, we think, his opinion was justified by the evidence. The appellants insist, however, that the disease did not exist before the sale; and rely upon the testimony of witnesses who prove that the slave was apparently in good health on the day of the sale, and for some time previously. That the slave was seriously ill on the 7th February, and died on the 8th, is proved. The buyer who institutes the redhibitory action must prove that the vice existed before the sale. But, in certain cases, the buyer is relieved by a legal presumption from the necessity of direct proof. "If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale." Civil Code, 2508. But it is said by the defendants' counsel that the presumption created by the Code is not a conclusive presumption, but one which merely shifts the burden of proof, and may be rebutted by the seller. We do not deem it necessary to decide the point; for, if that interpretation be correct, still the testimony adduced by the defendants is not of such a character as to satisfy the mind that the disease, although subsequently developed, did not exist before the sale.

*Judgment affirmed.*

## ALLEN, Executrix v. WILLS et al.

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The object of the statute of 18 March, 1844, is to enable mechanics and other workmen employed by a contractor to obtain the benefit of any amount due to him by the proprietor.

Where one who has contracted to erect a building, after having performed part of the work; becomes unable to fulfil his contract, the proprietor, on his default, may proceed to complete the building; and, if the amount expended in its completion, and the damages to which the proprietor may be legally entitled in consequence of the default, do not equal the unpaid instalment stipulated for the work, the contractor will have, to the extent of the residue, a claim, *ex equo et bono*, for his unpaid work. In the absence of evidence to the contrary, it will be presumed that the proprietor has been benefited to that extent.

Where a proprietor paid to one with whom he had contracted for the erection of a building an instalment before it became due under the contract, and the contractor subsequently failed, and the proprietor finished the building for a sum not exceeding the next and last instalment, and the amount of the instalment so paid in advance, after deducting from it the damages recoverable under the contract, was enough to pay the mechanics and other workmen who had notified the proprietor of their claims before the period at which the instalment so paid in advance became due, the proprietor will be responsible for the amount of their claims.

A party will not be liable for costs where she deposits in court the amount actually due by her; but where she contends that she is liable only for a sum less than the result of the litigation shows to have been due by her, she will be bound for the costs.

Mechanics, laborers, and furnishers of materials employed by one who has contracted for the erection of a building, are only entitled to the same privilege as the contractor, and where the contractor has failed to register his contract as required by law, those employed by him have no privilege. Stat. 18 March, 1844, s. 4. C. C. 2743, 2744, 2746, 3239.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. Wray*, for the appellant. *Grirol, Davis, Sever, Race and Foster*, for different defendants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff's testator contracted with *Wills* for the erection of a house for \$7,900, to be paid in six instalments. The fifth instalment was made payable when the plastering should be completed. The house was to be finished and delivered on the 20th September, 1847, under a penalty of \$50 per week during the delay. The house was never completed by *Wills*. He became insolvent, acknowledged his inability to proceed with the contract, and was formally put in default, on the 25th November, 1847. The plaintiff then proceeded to have the buildings finished at her own expense, which was accomplished on the 8th January. The plastering was not entirely finished until about the 1st December. The plaintiff, however, paid *Wills* the fifth instalment as early as the 16th November.

The principal question presented is, whether the appellees, three workmen who notified the plaintiff under the act of 1844 before the plastering was finished, can treat the payment as "anticipated" within the meaning of the law, and hold the plaintiff liable to them accordingly.

If *Wills* had continued the performance of the contract, and had not finished the plastering before the appellees notified their claims, the anticipated payment would clearly have been void, and against them. Has the plaintiff been relieved from responsibility by the fact that *Wills* subsequently failed to perform the contract.

The object of the statute of 1844 was to enable the creditors of the con-

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tractor to obtain the benefit of any amount due to him by the proprietor. If a contractor violate his contract after having done a portion of the work, his rights by reason of what he has done are not wholly gone. The proprietor, upon his default, may proceed to complete the building, and if the sum expended in such completion, and the damages sustained by the default and legally chargeable, do not absorb the unpaid instalments stipulated for the work, the contractor would have, to the extent of the residue, a claim, *ex æquo et bono*, for his unpaid work. In the absence of evidence to the contrary, it would be presumed that the proprietor had been benefitted to that extent. In the present case, the plaintiff, after *Wills'* default, finished the buildings at an expense not exceeding the sixth instalment. If, therefore, she had not paid the fifth instalment, she would have been bound to pay *Wills* the amount of the fifth instalment, deducting only such damages for the delay as were recoverable under the contract. What would have been the amount of those damages? The penalty stipulated in case of the failure to finish the house in September, was \$50 a week, but this penalty did not begin to run until *Wills* was put in default; for there was no stipulation in the contract that he should be deemed to be in default by the mere fact of his failure to complete the building at the specified time. See Civil Code 1905, 1927, 2122. Rogron, 1230. Merlin, *verbo*, Peine Contractuelle, § 3. If we deduct from the amount of the fifth instalment damages at the stipulated rate from the date of the default to the date of the completion of the building, it would still leave a sum sufficient to cover the claims of the appellees. When the plaintiff paid the fifth instalment, the contract was in full force. *Wills* was not then in default. Under the contract the instalment was then due, and the plaintiff paid in her own wrong. By having done so she is now empty handed; but if she had avoided doing what the law, in the interest of mechanics and laborers has forbidden, she would have had in hand, when the appellees gave their notice, a fund sufficient to pay them, although at that time unascertained.

As, therefore, we believe the object of the law was to secure to the creditors of the contractor the benefit of whatever the proprietor might justly owe him by reason of the undertaking, as the plaintiff paid unseasonably, which the law forbids; and as the appellees gave notice before the period arrived when *Wills* had a right to receive, the consequences of her imprudence must be borne by her and not by the creditors.

The appellant complains that the costs of the suit were charged to her, and that they ought to have been charged to the fund. If she had deposited in court what she was bound to pay, she would have been entitled to such an exemption. But she alleged herself to be liable for only \$281 50, and the result of the litigation shows her to be liable for a larger sum.

There was error in so much of the judgment as decreed a privilege in favor of the appellees. Under the act of 1844, as well as under the Code, they are only entitled to the same privilege as the contractor had. But *Wills* had no privilege, for his contract was not recorded. See act of 1844, s. 4. Civil Code, 2743, 2744, 2746, 3239. *Taylor v. Crain*, 16 La. 292. They must rank as ordinary creditors of the succession.

It is, therefore, decreed that so much of the judgment of the District Court as grants the appellees a privilege be reversed; and that, in other respects, the said judgment be affirmed; the said appellees *James McQuaid, A. Curtis and Robert Daley* paying the costs of this appeal.

## LORDELL v. CLARK.

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The acts of Congress passed for adjusting land titles within the Territory of Orleans and District of Louisiana, expressly provide that if claimants shall neglect to give notice of their claims, in writing, to the proper officers, or to cause the written evidence of them to be recorded, all their right, so far as derived from the first and second sections of the stat. of 2 March, 1805, shall become void and be forever thereafter barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance or other written evidence, which shall not be so recorded, be considered, or admitted in evidence, in any court of the United States, against any grant derived from the United States. This is not a mere rule of evidence binding only on the courts of the United States. It is a rule of property.

An order of survey obtained prior to the 1 October, 1800, though the land was actually inhabited and cultivated, had not, under the act of Congress of 2 March, 1805, relative to titles to lands in the Territory of Orleans and District of Louisiana, amended by sec. 1 of the stat. of 3 March, 1807, the effect of a complete title conferring on the grantee absolute ownership, and exempting it from the necessity of being recorded as required by sec. 4 of the stat. of 1805. The exemption only exists in favor of complete french and spanish grants.

No title passed from the french and spanish sovereign for lands in the Territory of Orleans and District of Louisiana by a mere order of survey; until a patent issued, all inchoate grants remained within the discretion of the grantor; and they were not changed in their character by the treaty by which Louisiana was acquired, that treaty imposing on the government of the United States only a political obligation to perfect them, which cannot be enforced by any action of the judicial tribunals.

**A**PPEAL from the District Court of West Baton Rouge, *Nicholls, J. Lobdell*, plaintiff, *pro se. Elam and Robertson*, for the appellants. The judgment of the court was pronounced by

ROSE, J. This is a petitory action founded on a patent issued on the certificate of purchase of two preemption rights. The defendant resists the claim, and alleges that he is the owner of the land covered by the patent, by virtue of an order of survey granted in 1798, under which he alleges that the land has been occupied and cultivated by *Jose Matteo Ugarte*, and those who claim under him, down to the present time. There was judgment against him, and he appealed.

The evidence leaves it extremely doubtful whether the claim of the defendant covers any of the land patented to the plaintiff's vendor. But if it did, it rests upon an incomplete grant, which is not shown to have been presented for confirmation, or recorded, as required by the various acts of Congress passed for ascertaining and adjusting titles and claims to land within the territory of Orleans. Those acts expressly provide that if claimants shall neglect to give notice of their claims in writing to the proper officers, or to cause to be recorded the written evidence of them, all their right, so far as the same is derived from the two first sections of the act of 1805, shall become void, and forever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States, against any grant derived from the United States. Land Laws, pp. 520, 548.

The defendant contends that, by the first section of the act of 1805, amended by the first section of the act of 1807, an order of survey, obtained prior to the first day of October, 1800, where the land was actually inhabited and cul-

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tivated, had the effect of a complete title ; that it conferred on the grantee absolute ownership, and was not required to be recorded under the fourth section of the act of 1805. If this construction of the acts of Congress was correct, it would not avail the defendant, because he has failed to show that the land claimed was actually inhabited and cultivated by the grantee, or by any person for him ; the occasional possessions he has shown, being totally unconnected with the order of survey under which he claims. But we are satisfied that the exception contended for, only exists in favor of complete french and spanish grants.

It is further alleged that, the right of the defendant to the land, is secured by the treaty of cession, and could not have been taken away by an act of Congress. This argument takes for granted that the title passed from the sovereign under an order of survey, even when there was no actual settlement and cultivation. But it has been settled by the highest judicial authority that such was not the effect of inchoate grants ; that until the patent issued, they remained within the discretion of the grantor ; and that they were not changed in their character by the treaty by which Louisiana was acquired ; that this treaty imposed upon the government of the United States only a political obligation to perfect them ; and that this obligation, sacred as it may be, cannot be enforced by any action of the judicial tribunal. *Chouteau v. Eckhart*, 2 Howard, 344. *United States v. Wiggins*, 14 Peters, 330. *Pontalba v. Copland*, 3 An. 86.

It is urged on the authority of *Murdock v. Gurley*, 5 Rob. 457, that the penalty imposed by the acts of Congress is a mere rule of evidence binding only upon the courts of the United States. We cannot view it in that light, considering, as we do, orders of survey, unattended with actual settlement and cultivation, as mere equitable claims. under which no title passed. It is undoubtedly a rule of property. Since the treaty of cession, the United States have acted uniformly upon that class of claims by legislation, and their right to prescribe the mode and the time, by and during which, they might be ripened into perfect titles, cannot now be doubted.

After extending again and again the time allowed to make proof of inchoate grants, and complying fully with the political obligation imposed upon them by the treaty of cession, the land in controversy has remained vacant, and they have granted it to the plaintiff's vendor, with the solemn pledge that he should not be disturbed by any inchoate grant not previously made known to the proper authority. We must hold this grant to be the paramount and better title.

The chain of titles of the plaintiff ascends to the patent, which issued directly in *Millaudon's* name, as purchaser of the settlement rights of *Jones* and *Bunker*. This appears to us sufficient in a case where *Jones* and *Bunker* are not parties.

*Judgment affirmed.*

#### SUCCESSION OF SERRET.

A demand against a surviving husband for an amount due to the succession of his wife, received by the former from sales of the separate property of the wife during marriage, cannot be cumulated with proceedings for the liquidation and partition of the succession. To cumulate such proceedings would be irregular, and tend to embarrass judicial proceedings. The demand must be made by a separate action.

**A**PPEAL from the District Court of West Baton Rouge, *Nicholls, J. La-bauve*, for the appellant. *Bennett and Herron*, contrâ. The judgment of the court was pronounced by

SUCCESSION  
OF  
SERRET.

*KIRK, J.* The administrator of *Henrietta Serret*, deceased, with a view to a final liquidation and partition of her succession, presented to the Probate court, as it formerly existed, a tableau exhibiting the debts of the estate, the balance remaining for partition, and the share falling to each of the heirs. The amount due to the succession by *Hypolite Hébert*, surviving husband of the deceased, arising from sales of the separate property of the wife during the marriage, was also set forth. This tableau was accompanied by a petition, in which the administrator prayed, that the heirs of the deceased, and *Hypolite Hébert*, in his own right, as surviving partner, and as tutor to his minor child, also an heir, be cited to show cause why the liquidation and partition should not be made the judgment of the court. He also prayed that *Hypolite Hébert* be condemned to pay the sum which he appeared by the settlement to owe, and that the administrator be authorized to distribute the sum, when collected, among the heirs, in the manner proposed in the partition. The heirs, in their answer, admit the tableau to be correct, and unite in the prayer for its homologation.

*Hébert* excepted to the jurisdiction of the Probate court, avering that the question of his indebtedness could only be determined by a court of ordinary jurisdiction, and that it could not be cumulated with a proceeding for a liquidation and partition of the succession, to which the administrator and heirs could alone be made parties. The exception was still pending when our present judicial system went into operation, and the cause was transferred to the District court. The judge sustained the exception, and dismissed the action against *Hébert*. The administrator has appealed.

The defendant cannot complain that he is called into a proceeding having for its object the final liquidation of the succession. As the tutor of one of the heirs, and as the surviving partner of the community, he was properly made a party. Indeed we do not understand his exception to extend beyond the competency of the court to inquire into his indebtedness.

But as far as relates to the demand against him individually for the price of dotal property of the wife alienated during the marriage, which he is alleged to have received and appropriated to his own uses, the action is one of the administrator against him to coerce the payment of a sum of money for distribution among the heirs. The ascertainment of the fact of his indebtedness arising from this cause, does not depend upon the liquidation and partition, but may be determined in a separate action. The defendant stands in the attitude of any other debtor, and it is obvious that the cumulation of a suit against the heirs for a settlement and partition, with actions against debtors for payment, is irregular, and that its tendency is to embarrass judicial proceedings. Although the District court, as at present organized, had jurisdiction of all the matters involved in the proceeding, it did not, in our opinion, err in driving the administrator to his separate action against the defendant.

*Judgment affirmed.*

## PRESTON, Executor v. CHRISTIN et al.

Where a party is placed on the tableau of distribution of the effects of a succession as a creditor for a certain sum, and the tableau is homologated, the homologation of the tableau is a judgment in favor of the creditor, which, so far as the succession is concerned, cannot be prescribed by less than thirty years.

**A**PPEAL by the defendants from a judgment of the District Court of Iberville, *Nicholls, J. J. M. Jones and R. A. Upton*, for the plaintiff. *Labauve*, for the appellants. The judgment of the court was pronounced by

**SLIDELL, J.** The defendants, administrators of the succession of *Bahamonda*, filed a tableau of distribution in the year 1833, in which, after stating the debts and assets, they exhibited a balance of a certain sum to be divided among the heirs. Upon this tableau *Layton* was recognized as a mortgage creditor for \$1,700, with ten per cent interest. The allowance of interest was opposed; and this opposition having been sustained the tableau was finally homologated, thus leaving *Layton* a mortgage creditor for \$1,700. For this amount the present action is brought, and the prayer of the petition is for a joint judgment against the defendants personally and in their capacity of administrators, for the sum of \$1,700, with interest from the date of homologation.

This action was not brought until 1848, and the defendants contend that they are protected by the prescription of ten years. The homologation of the tableau was a judgment in favor of *Layton*, which, so far as the succession was concerned, was not prescriptible by less than thirty years. We cannot perceive how the defendants can be permitted to invoke a shorter prescription, while they remained the official representatives of the succession and had obtained no judicial discharge.

The defendants say that, in point of fact, they had not received the funds to pay the plaintiff. If they did not, it was their own fault. Their wives bought a large portion of the property of the succession, and the defendants, if they chose to deliver them the property sold without receiving its price, did so at their own risk.

The defendants claim credit for various alleged payments. The only payment which we consider proved is one made by the delivery of a quantity of sugar to *Layton*. The jury appears to have allowed for this a credit of \$540. The application of the appellee to strike off this credit comes too late. An answer to the appeal, praying for an amendment with regard to another item, was seasonably filed by the plaintiff. In that answer the plaintiff expressly acknowledged that the only error in the judgment of the court below was with regard to the item then specified. The supplemental answer to the appeal, which he afterwards prayed leave to file, was inconsistent with the first answer, and was also inadmissible under the 890th article of the Code of Practice.

We think the jury improperly allowed a credit for \$580, for an amount which the defendants contend had been collected by the plaintiff's agent from the estate of *Guidry Davis*, who received that sum is proved to have received

ed it in his capacity of administrator of *Guidry's* estate; but there is no proof that, as administrator, he was authorized to pay, or ever did pay, it to *Layton*; or that he ceased to hold it as administrator, and held it as *Layton's* agent.

The plaintiff is entitled to interest from the date at which the defendants were put in default.

It is, therefore, decreed that the judgment be reversed, and that the plaintiff recover of the said defendants, *Auguste Christin* and *Valery Duplessis*, the sum of \$1080, with interest from the 16th August, 1842, and costs in both courts.

PRESTON  
v.  
CHRISTIN.

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### MARIONNEAUX v. EDWARDS.

Where a party interrogated on facts and articles in relation to a verbal contract to transfer real estate denies the contract, her answer cannot be contradicted by parol evidence; nor is parol evidence admissible to prove such a contract, in an action to recover damages for a breach of it.

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**A**PPEAL from the District Court of Iberville, *Penn. J. Deblieux*, for the appellant. *Edwards, pro se.* The judgment of the court was pronounced by

Rost, J. This suit was brought to recover damages for the alleged breach of a contract to transfer real estate. The petition sets forth that, on the 18th July, 1845, a tract of land of six arpents front by forty in depth, lying in the rear of the plantations of the plaintiff and defendant, was sold at probate sale, and that the defendant had agreed with plaintiff to purchase the land in his own name, and, when the plaintiff was ready and willing, the defendant was to transfer and sell to him the land lying in the rear of his plantation, at the same price per arpent at which the whole tract should be purchased; that the defendant did buy the land, but when called upon to comply with his contract refused to do so, in consequence of which refusal the plaintiff alleges he has sustained the damages claimed. The defendant denied all the allegations of the petition, and pleaded the prescription of one year in bar of the action. There was judgment as of non-suit, and the plaintiff appealed.

The contract alleged in the petition not having been reduced to writing, the plaintiff interrogated the defendant on oath in relation to it, under article 2255, C. C. The answers of the defendant, though perhaps not in all respects satisfactory, negative the contract alleged, and the plaintiff offered witnesses to disprove them and to substantiate his allegations. This testimony having been objected to and rejected, the plaintiff took a bill of exceptions.

We are of opinion that the district judge did not err. When a party interrogated upon facts and articles in relation to a verbal contract to transfer real estate denies the contract, his answers cannot be contradicted by parol evidence; nor is parol evidence admissible to prove such a contract in an action of damages for a breach of it. *Bach v. Hall*, 3 La. 116. *Bauduc v. Conrey*, 10 Rob. 466. *Breed v. Guay*, 10 Rob. 35. *Patterson v. Bloss et al.*, 4 La. 374.

The plaintiff having failed to make out his case, it is unnecessary to notice the plea of prescription.

*Judgment affirmed.*



## LEFTWICH et al. v. BROWN.

One who purchases the right of action of a minor against his tutor, can acquire no greater right against the latter than his assignor had ; and the tutor may make the same defence to the action, and avail himself of the same means as though the suit were brought by the pupil himself; and if the defendant has become the creditor of his pupil by any advances made to him since his majority, and previous to the purchase by the plaintiff, he will be entitled to set them up in defence to the action.

The object of art. 2622 C. C. which provides that, "he against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, with interest from its date," is to prevent unnecessary litigation. But where a defendant, instead of paying the price for which the right was transferred, and thereby putting an end to the litigation, continues to contest the suit, opposes the plaintiff's right to recover, and protracts the litigation, he defeats the very object of the law, and cannot avail himself of the provision established in his favor.

**A**PPEAL from the District Court of Iberville, *Nicholls, J. J. M. Jones*, for the plaintiffs. *Deblieux*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. On the 27th May, 1847, *Walter Brown*, for the consideration of the sum of \$550, acknowledged to have been received by him, assigned to the plaintiffs all his rights and actions against the defendant, his former tutor. The assignment purports that those rights and actions were pending in a suit then existing in the court of the sixth district, for the parish of Iberville. Under this assignment the plaintiffs instituted their suit against the defendant for an account of his tutorship of *Walter Brown*, and claim judgment against him for the sum of \$1,949, with interest, &c. The defendant in his answer sets up various charges against the assignor, *Walter Brown*, his former pupil, all of which accrued previous to the assignment to the plaintiffs. The District court gave judgment for the sum of \$1,445 35, with interest from the 1st March, 1825, and a legal mortgage on the property of the defendant. The defendant has appealed. The plaintiffs have remitted the interest accruing previous to January 1st, 1845, the day of the majority of *Walter Brown*.

On the trial of the cause a bill of exceptions was taken to a decision of the court refusing to receive evidence of certain matters set up in the defendant's answer, on the ground that such matters could not be pleaded in compensation, on account of their being unliquidated, nor set up in reconvention against the demand of the plaintiffs. We are of opinion that the plaintiffs, by their purchase, have acquired no greater rights against the defendant than their assignor, *Walter Brown*, had at the time it was made, and that the defendant can make in this suit the same defence, and avail himself of the same means, as he could if the suit were brought by *Walter Brown* himself. The action is one of account for the tutorship, and if the defendant has become the creditor of his former pupil by any advances to him since his majority, it is clear that he has diminished his debt for so much. The separation of the debt resulting from the tutorship from that contracted since, according to the opinion of the district judge, we think inadmissible. The accounts between *Walter Brown* and the defendant up to the time of the purchase of his right by the plaintiffs, which are all equally unliquidated, must be settled, and the balance is due by the defendant to the plaintiffs. 12 Duranton, Droit Français, 598, 599. 7

Toullier, 392. We think the court erred in refusing to admit the evidence offered as stated in the bill of exceptions.

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v.  
BROWN.

But the defendant pleaded that the assignment of his right and action by *Walter Brown* to the plaintiffs, was the sale of a litigious right, and that he must be released by paying to the plaintiffs the price they paid, with interest, under article 2622 of the Code. The defendant insists on his right to have the benefit of this plea in the final judgment to be rendered, and that in no event can he be adjudged to pay a larger sum than the plaintiffs' paid for the claim against him.

The laws *Per diversas* and *Ab Anastasio, C. mandati*, on which the articles of our Code concerning litigious rights are founded, have no other object than the prevention of unnecessary litigation, which is attained in a great measure by the check they impose on the cupidity of speculators in law suits. They enable the defendant to take the place of the purchaser of the suit against him, by paying the price he has paid for it, with interest. Thereby the litigation is ended, and the object of the law attained. But if, as the defendant has done in this case, he continues to contest the suit, raises difficulties as to the right of the plaintiff to recover his debt and protracts the litigation, he evidently defeats the very object of the law, and cannot avail himself of the provision which the law has established in his favor for the purpose of terminating litigation. To permit him to do it, would be to defeat the very object of the law. Pothier, *Contrat de Vente*, 596, 597. Merlin, *Rep. Verbis Droit litigeux*.

It is, therefore, ordered that the judgment of the District Court be reversed, and that the cause be remanded for further proceedings, with instructions to the district judge to receive the evidence offered by the defendant as set forth in his bill of exceptions, and that the plaintiffs pay the costs of this appeal.

### EX PARTE POWERS et al.

A mandamus will not be granted, to compel a judge of a District Court, in the trial of a rule to show cause why a party should not be punished for a contempt, to allow defendant to except to the admission of testimony and to his refusal to permit the evidence to be reduced to writing, nor to compel him to allow an appeal.

**A**PPPLICATION for a mandamus to the First District Court of New Orleans, *McHenry, J.* In this case the counsel of *Powers* and others, presented the following petition:

"To the Honorable the Judges of the Supreme Court of the State of Louisiana.—The petition of *William Powers, William Lennox, alias Scotch Bill, and John Reese, alias English Jack*, respectfully represents: That a certain *John Duggan* presented a petition against your petitioners and others, in the First District Court of the city of New Orleans, whereof *John McHenry, Esq.* is the judge, alleging that your petitioners had violated a privilege of which the said *Duggan* pretends to be the owner, and which, as he avers, gives him the exclusive right of keeping a ferry and of carrying passengers for hire between the first and second wards of the second municipality, and the right bank of the river Mississippi, and which privilege the said *Duggan*

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POWERS.

pretends that your petitioners have violated, and applied for an injunction, restraining petitioners from violating the aforesaid pretended exclusive right, which injunction was granted, as the whole will more fully appear from the copy of the petition and order of injunction hereto annexed.

" Petitioners further aver that on monday, the 29th January, 1849, the said *Duggan* appeared in the said First District Court by *J. G. Sever, Esq.*, his counsel, and having filed an affidavit setting forth that petitioners had violated the injunction, moved that they show cause on the next day, the 30th of January, at 10 o'clock a. m. why they should not be punished for a contempt of the authority of said District Court and the disregard of its mandate, as per copy of said motion hereto annexed will more fully appear.

" Your petitioners further show, that on the trial of said motion, after petitioners had answered the same, denying under oath the facts set forth in *Duggan's* affidavit, the said judge permitted said *Duggan* to be sworn and examined as a general witness notwithstanding his interest in the cause, and notwithstanding the opposition made to his competency by the counsel of your petitioners; that the said judge also refused said counsel of your petitioners to take a bill of exception to the admission of said testimony, and to have all the testimony in the cause reduced to writing; and proceeded to give judgment condemning petitioners to five days imprisonment, upon the sole testimony of the aforesaid *Duggan*, and without regard to the evidence adduced by your petitioners.

" Petitioners further show, that the said judge forthwith ordered your petitioners to be taken into custody, and that they are now in actual confinement, although they, immediately after the delivery of the opinion of the court, applied to the aforesaid judge to allow them an appeal to this honorable court, which appeal the judge refused.

" In consideration of the premises petitioners pray that this honorable court will grant them a writ of mandamus requiring the Honorable *John McHenry*, judge of the First District Court of New Orleans, to show cause why he should not allow petitioners to except to the admission of the testimony of *Duggan*, and his refusal to permit the testimony taken on the trial of the aforesaid motion to be taken down by the clerk of the court, and to compel him to grant petitioners an appeal from his aforesaid judgment. And your petitioners protesting that the said judgment is illegal and erroneous, and does them irreparable injury, further pray for general relief, &c.

" SCHMIDT, of counsel."

The petition was accompanied by an affidavit of counsel, that the facts stated therein are true, and with a copy of the petition for an injunction, and of the rule on *Powers et al.* to show cause why they should not be punished for a contempt. The judgment of the court was pronounced by

SLIDELL, J. It is ordered that the application for a mandamus be refused, no case being exhibited for the interposition of the court.

### DORSEY v. HILLS.

A judgment prepared and signed by the judge in vacation, in a case in which no decree could be rendered at chambers, has no effect until entered upon the records at the ensuing

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term (C. P. 543, 544); and an appeal may be obtained, on motion, at that term. Stat. of 22 March, 1843.

Working animals may be seized separately from the plantation to which they are attached, when the debtor himself points them out to the sheriff for seizure. Under such circumstances the debtor cannot afterwards object to the seizure.

Where in a petition to enjoin a sale, specific objections are made to the manner of advertising it, evidence will be inadmissible to establish other irregularities. The proof should be confined to the objections specified.

An injunction will not be dissolved where the facts show that the party will be immediately entitled to resort to the same remedy; but such facts must appear on the face of the proceedings, or from evidence legally admitted, or received without objection.

**A** PPEAL from the District Court of Carroll, *Curry, J. Browder*, for the appellant. No counsel appeared for the plaintiff. The judgment of the court was pronounced by

KING, J. A motion has been made to dismiss the appeal in this case, on the ground that it was taken by motion in open court at a time subsequent to that at which the judgment was rendered. Acts of 1843, p. 40.

It appears that the cause was tried at the November term of 1844, but was not then determined. After the adjournment of the court the judge prepared and signed a decree, which was not spread upon the minutes until the next ensuing term, in April, 1845, when a motion for a new trial was made, which being over-ruled, an appeal was taken by motion. The judge could render no judgment in a contestation of this kind at chambers, and the decree signed by him during vacation acquired no force as such until it was entered upon the records. C. P. 543, 544. At the time when this was done, the appeal was taken by motion. The appellant was within the provisions of the act of 1843. The motion to dismiss is therefore overruled.

Upon the merits, the plaintiff enjoined the execution of a writ of *fiery facias* on two grounds: 1st. That the advertizement of the property was illegal, because made by a person not authorized to perform the act, and because the property was not described with sufficient accuracy; and 2d. Because the judgment on which the writ issued should have been credited with a sum of \$300 paid on account.

The objection to the authority of the person who advertized the sale was unfounded. The advertizements were made and posted up by the sheriff. The property seized is described in the advertizements as twelve good work horses. This description was held by the judge to be sufficient, and we concur in opinion with him, there being no evidence showing that they possessed qualities which required a more specific designation.

The district judge also considered that the plaintiff had failed to prove the alleged credit, and his conclusion is supported by the record. But he sustained the injunction on two grounds not urged in the plaintiff's petition, viz: 1st. That working animals can not be seized separately from the plantation to which they are attached. 2d. That the advertizements were all posted up in the same village, and not at three different points in the parish.

As regards the first ground, it appears to have escaped the district judge that the plaintiff himself pointed out to the sheriff the property seized, and could not therefore have made the objection to the legality of the seizure which has been urged in his behalf.

The evidence in relation to the second ground was objected to, and a bill of exceptions taken to the opinion of the judge receiving it. The evidence

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was clearly inadmissible under the pleadings. The specific objection to the advertizements were, that they were not made by a duly authorized officer, and that the description of the property was indefinite. To those allegations the proofs should have been confined. *Landry v. Leglise*, 3 La. 219. No complaint was made that they had not been posted up at the proper places. It is true that courts will not dissolve injunctions when the facts show that the party would be immediately entitled to resort to the same remedy. But such facts must appear upon the face of the proceedings, or from evidence legally admitted under the pleadings, or received without objection. If the ground assumed by the judge had been taken by the plaintiff originally, it is obvious that the defendant could have remedied the defect by giving to the sale the publicity which it is contended that the law requires. The defendant has been unnecessarily impeded in the execution of his judgment, and we think that he is entitled to the damages claimed.

The judgment of the District Court is therefore reversed, and it is ordained that the injunction issued in the case be discharged, and that the defendant *Hills* recover from the plaintiff *Zachariah H. Dorsey*, and his surety, *Thomas V. Davis*, in *solido*, the sum of \$87 34, as damages, being twenty per cent on the amount of the judgment enjoined. It is further ordered that the plaintiff pay the costs of both courts.

### POWELL v. McKEE.

Where a creditor fraudulently obtains possession, in another State, of the property of his debtor, who resided there, and brings it clandestinely into this State, without the consent or knowledge of the debtor, and immediately attaches it, the attachment will be dissolved. The fraudulent act of the plaintiff cannot give jurisdiction to our courts.

**A**PPEAL from the District Court of Madison, *Curry, J. A. Pierce*, for the appellant. *J. Dunlap*, for the defendant. The judgment of the court was pronounced by

KING, J. This suit was commenced by an attachment, under which three slaves and a wagon belonging to the defendant, who was an absentee, were seized. The attachment was dissolved, and the plaintiff has appealed.

The evidence shows conclusively, that the plaintiff obtained fraudulent possession of the property attached, in the State of Mississippi, where the defendant resided, and clandestinely removed it to this State, without the consent or knowledge of the defendant, and immediately instituted the present proceedings. The wrongful and fraudulent act of the plaintiff, of bringing property of the defendant into this State, gave no jurisdiction to our courts, and the judge did not err in dissolving the attachment.

*Judgment affirmed.*

## DOWNES v. FERRY.

A judgment will not be reversed for an error in calculating interest, not exceeding five dollars in amount, where no effort was made to correct it in the lower court by an application for a new trial.

**A** PPEAL from the District Court of Carroll, *Copley, J. Stockton and Steele*, for the plaintiff. *J. Dunlap and Harmon*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The defendant complain that the judgment allows interest from too early a date. The difference arising from the alleged error is about \$5. No effort was made to have it corrected by an application for a new trial. The amount is too insignificant to justify the reversal of the judgment, and the infliction upon the appellee of the costs of the appeal. See *Medley v. Voris*, 2 An. 141. *Judgment affirmed.*

## ARNAULD et al. v. DELACHAISE.

Where a proprietor who had divided a part of a tract of land into lots, leaving a space between those nearest the river and the public road, as well as the batture, and the remainder of the tract in the rear beyond the lots, undivided and vacant, sells the lots in conformity with a prospectus which recites that "the portion of the front, of the batture, of the pasture, and of the cypress swamp corresponding with the lots offered for sale, is abandoned in perpetuity in favor of the purchasers, to be by them enjoyed in common, with this sole condition that the said purchasers shall not send in the common pasture but three head of animals for each lot, and shall cut wood in the swamp for their private use only, and not for sale," the interest of the purchasers in the front, batture, pasture and cypress swamp, is not a mere right of use, or usufruct, but the vendor will be considered as having completely divested himself of all right to the property, the term *abandonment* excluding any reservation as to the title as positively as the term *perpetuity* excludes any limitation of time. The conditions as to the use of the pasture land and wood, is intended merely to regulate the use among the purchasers, and does not conflict with, but is in furtherance of, the avowed objects of the sale.

If the terms used would, in a testament or donation, transfer the property, they will have the same effect in a contract of sale.

**A** PPEAL from the District Court of Lafayette, *Clarke, J.*

*Maurian*, for the plaintiffs. The purchasers from *Wiltz* acquired only a usufruct or right of use to the vacant space in front, to the batture, pasture and cypress swamp. They acquired only a right to *enjoy*, and not to *dispose* of it. Code of 1808, p. 100, art. 34; p. 102, art. 1; p. 110 art. 1; p. 124, art. 63. Civil Code, 479, 483, 525, 621. Code Nap. 544, 578, and Rogron's Comm. on those arts. and on art. 625. Lacroix, *Clef des Lois Romaines, verbo Usage*, Rodriguez de Fonseca, vol. 3, p. 416, no. 3; p. 404, proeme Law 1. The right of use or usufruct has been forfeited in this case by: 1, non-user; 2, abuse; 3, by the expiration of the term for which it was granted.

*Lambert and Mazureau*, on the same side.

*Le Gardeur*, for the defendant, appellant. 1. It was not a right of use which the defendant acquired under the abandonment in the *Prospectus*.

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The right of use, as defined by the Code, is that given to any one to make a gratuitous use of a thing belonging to another, or to exact such a portion of the fruits it produces as is necessary for his personal wants and that of his family. Art. 621. The *dominium* of a thing is composed of three different attributes corresponding to as many partial rights, to wit: the *usus* or use, the enjoyment or *fructus*, and the right of disposing or *abusus*. We also know that the *usus*, when granted separately from the other attributes, constitutes a right of use, and the *fructus* or enjoyment, which also includes the *usus*, what is called in law a right of usufruct. Ducaurroy, (*Institutes expliquées*, vol. 1, no. 438) says: "En comparant l'usufruit et l'usage, on appelle ce dernier nudus usus, pour indiquer l'usage séparé de la jouissance, l'usage sans fruits, nudus usus, id est, sine fructu, de même qu'on appelle nue-propriété celle dont on a séparé la jouissance. Effectivement, l'usager: uti potest, frui non potest, tandis que l'usufruitier a le double droit d'user et de jouir." It is, therefore, plain that the title which expressly grants the enjoyment, that is, the *fructus* of a thing, constitutes on behalf of the grantee a right of usufruct and not a right of use. Now, by referring to the prospectus, we see that the *batture*, *devanture*, *savane* and *cyprière* are abandoned in perpetuity to the purchasers, not to be *used*, but to be *enjoyed*, by them in common; and the consequence is that if the ownership did not pass under this abandonment, it created at least a right of usufruct, but most certainly not a right of use.

2. The abandonment in the prospectus did not create a right of usufruct.

A usufruct is a personal servitude which attaches to the person for whose benefit it is established and terminates with his life. La. Code, art. 642. "Les servitudes personnelles," says Mackeldey, (*Droit romain*, p. 153, § 278.) "ont toutes ce caractère commun, qu'elles sont des droits essentiellement personnels, que par là elles ne peuvent être séparées de la personne qui y a droit, et s'éteignent par sa mort, si elles n'ont été expressément concédées pour elle et pour ses héritiers. Le droit romain range parmi les servitudes personnelles, l'usufruit, l'usage et l'habitation." Proudhon (*Droits d'Usufruit*, vol. 1, p. 4, no. 9, 2d paragraph) lays down the rule that: "L'usufruit est, pour l'usufruitier, un droit purement personnel, parce qu'il consiste dans la faculté de jouir; faculté essentiellement corrélatrice à la personne qui en use; et de là il résulte (no. 12) que, quoique, en thèse générale, on soit censé stipuler tant pour ses héritiers que pour soi-même, néanmoins, lorsqu'il s'agit d'un droit d'usufruit établi par acte entre-vifs, il n'est toujours acquis qu'au profit de celui pour lequel il a été nominativement stipulé, et ne peut s'étendre à ses successeurs sans une stipulation expresse à cet égard." Voet (*ad Pandectas*, vol. 1, p. 600, no. 2) says: "Personales servitutes præcipuè tres sunt, usufructus, usus et habitatio. Quamvis enim haud videatur eundem inficias, quin ex quæ naturâ suâ reales sunt, ex voluntate constituentium in personales degenerare queant, tamen cum hæ tres ita personales sint, ut ne ex conventionem quidem specificâ fieri reales possint, usufructu et usu personam desiderante, cujus ossibus inhereat, et naturâ habitationis vel justa sensum communem regnante, quò minus prædio constituatur, meritò etiam solæ personalium nomen per excellentiam sortitæ sunt." Ortolan, in his *Institutes explained*, vol. 1, p. 430, says: "Nous passons aux servitudes personnelles, dans lesquelles le droit détaché de la propriété n'est point détaché pour augmenter l'agrément ou l'utilité d'un fonds; mais pour l'avantage spécial d'une personne à laquelle il appartient." Dalloz (*Vo. Servitudes*, no. 6) says: "La servitude ne peut exister que sur un fonds et en faveur d'un fonds, et ne peut être imposée ni à une personne ni en faveur d'une personne; c'est le caractère qui le distingue essentiellement, des droits d'usufruit et d'usage, lesquels sont indépendans, pour celui qui les exerce, de la possession ou propriété d'un fonds."

From these laws and authorities it follows, as a necessary consequence, that a grant does not, nay cannot, create a usufruct, unless it be made to a person by name, on account of that person alone, and without any regard to the grantee being or not in possession of a particular estate. Let us apply this rule to the abandonment by *Joseph Wiltz*. He says, in the prospectus, that the *batture*, *devanture*, &c., are abandoned in perpetuity to the purchasers of the forty-two lots offered for sale. It is plain, therefore, that the abandonment is made to no person by name; that it does not contemplate the personal advantage of the transferees, without regard to their being or not in possession of any estate; but, on the contrary, refers exclusively to such persons only, whoever they may be, that may happen to acquire a particular piece of property.

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In other words, the right granted by the abandonment attached to the property to be sold without any reference to the particular person that might purchase it; the object being clearly to enhance the value of the property, by the advantages attached to it. Therefore, under the rule as deduced not only from the authorities above quoted, but also from our own laws, the abandonment being made to no person by name, nor on the exclusive account of any person, but, on the contrary, for the benefit of the property itself, did not, nay could not create a right of usufruct.

But I am willing to admit, for argument sake, that instead of abandoning the things themselves, to wit: the batture, devanture, &c., as he expressly did, *Wiltz* had abandoned only, but in perpetuity, the usufruct of those things. What would the consequence be? Unquestionably, that the abandonment being made in perpetuity and the naked property being in express terms given to none, nor reserved for the benefit of the vendor, the ownership itself passed to the purchasers. The authorities are positive to that effect. Proudhon, (vol. 1, p. 4, no. 8,) lays down the rule that perpetuity is contrary to the very essence of usufructs, and from that rule, draws the following consequences, viz: "Si la jouissance intégrale d'un fonds avait été expressément léguée à perpétuité au profit d'une commune, le droit légué n'aurait d'usufruit que le nom, et ce serait véritablement la propriété qui aurait été léguée." Dalloz (verbo Usufruit, no. 1,) fully concurs in the opinion of Proudhon on this question. Roland de Vilargues also concurs in the opinion of Proudhon. He says (Vo. Usufruit, no. 8): "Remarquez que l'usufruit ne peut être que temporaire; car s'il pouvait être perpétuel dans sa durée, le droit de propriété ne serait plus rien. Aussi lorsqu'il est établi au profit d'un établissement public destiné à durer toujours, la loi, dans le silence de l'homme, lui assigne elle-même un terme. D'où l'on doit conclure que si un usufruit avait été légué à perpétuité au profit d'une commune, ce serait véritablement la propriété qui aurait été donnée." Favard de Langlade (Vo. Usufruit, § 4, no. 1,) says: "Si l'usufruit ne s'éteignait point, le droit du propriétaire serait complètement illusoire, et l'utile, la véritable propriété serait dans les mains de l'usufruitier. Aussi la Cour de Cassation n'a-t-elle point hésité à reconnaître un droit réel de propriété dans un usufruit perpétuel."

The decision referred to by Favard de Langlade was rendered by the Court of Cassation on the 29th June, 1813, in the case of *Varré v. D'Avranche D'Hangeranville*. Merlin, upon whose conclusions it was rendered, makes the following remarks, viz:

"Par l'acte, *Guillaume de Montmorency* (the original grantor) cède et transporte aux preneurs, moyennant deux rentes foncières, annuelles et perpétuelles, en grains et en quotité de fruits, non pas la simple jouissance, non pas l'usufruit, mais le corps même, et par conséquent la propriété de deux pièces de terre, l'une de trois cents arpents, formant le gros du fief des Edrolles; l'autre, de deux cents arpents, formant le gros du fief de Lys. Il déclare même littéralement céder le fonds propre et domaine de ces deux fiefs; il oblige de l'un et de l'autre à lui en payer les redevances convenues, à peine de confiscation et de rentrée en icelles terres, confiscation et rentrée qui supposent certainement une expropriation actuelle; enfin, il se réserve sur ces memes terres toute justice, travers, chasse et seigneurie.

"Si ce n'est pas la un acte translatif de propriété, nous le disons hautement, il faut renoncer à l'esperance de trouver nulle part un acte de cette nature; il faut refuser aux termes qui y sont employés le sens qu'on leur a attaché dans tous les temps; il faut nier qu'il fait jour en plein midi."

In the act by which *Guillaume de Montmorency* ceded the five hundred arpents of land, he subjected the transferees to the payment of an annual and perpetual rent under penalty of forfeiture, and expressly reserved to himself the right of seigneurie. In the transfer by *Joseph Wiltz*, he abandoned in perpetuity the batture, devanture, savane and cyprière, but subjected the transferees to no obligation towards him and made no reservation whatever for his benefit. The case before the Court of Cassation was, then, much stronger than that now under consideration, and yet that court, concurring in the opinion of Merlin, disagreed with the appellate Court of Amiens which had decided that the usufruct only of the five hundred arpents had been granted by *Montmorency*, and decreed that the ownership itself had been conceded, and that the obligation of paying the rents was extinguished by prescription, and the transferees dispensed from complying with that obligation.



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3. It was the ownership itself that passed to the defendant under the abandonment in the prospectus.

The language of the prospectus is clear. But admitting for argument's sake, that the language and intention of *Wiltz* were not as clear as I conceive them to be, then we must endeavor to ascertain them by the ordinary rules of construction.

Proudhon (*Droit d'Usufruit*, vol. 1, no. 497,) lays down the rule that when a grant is expressly intended to be perpetual, it does not create a mere right of usufruct, but conveys the ownership of the thing itself. He says: "De quelque locution que le testateur se soit servi, l'impropriété des termes doit fléchir devant l'expression de sa volonté sur les effets qu'il a entendu attacher à sa disposition: or l'usufruit étant essentiellement temporaire, si donc le donateur a voulu au contraire que l'objet de sa libéralité fut perpétuel, et qu'il l'ait clairement exprimé, il est nécessaire d'en conclure que ce n'est pas un droit d'usufruit qu'il a légué. C'est le droit de propriété qui aura été légué sous une fausse dénomination quelconque, si la jouissance du légataire doit s'étendre à tous les produits et emolumens du fonds, parce qu'ayant toute l'utilité du domaine, et l'ayant à perpétuité, il sera nécessairement propriétaire." Now, in this case, the grant is intended to be perpetual and all the "produits et emolumens" of the thing, so far as the grantor is concerned, are conveyed to the grantees. The consequence, therefore, is that the ownership itself was granted.

The same author (vol. 1, nos. 499 and 500,) holds that the usufruct is conveyed, only when the separation of the right of enjoyment from the right of ownership is clearly expressed in the act; and he comments upon that rule in the following manner, to wit: "Cette règle est fondée sur ce que, sous quelque dénomination qu'une chose soit comprise dans un legs ou une donation, le domaine entier est censé aliéné s'il ne paraît pas évident que c'est seulement l'usufruit qui en été détaché, ou que c'est seulement la nue propriété qu'on a voulu aliéner en se réservant l'usufruit; attendu qu'il est contraire à l'ordre naturel des choses que le propriétaire n'ait pas le droit de jouir de ce qui lui appartient, et qu'en conséquence il faut que la dérogation à cet ordre résulte formellement de l'acte de donation. C'est par suite de ce principe que les auteurs qui ont écrit sur cette manière, enseignent, d'après le texte des lois romaines: Que le legs d'une maison pour l'habiter, celui d'un fonds pour en jouir, celui d'un domaine pour que le légataire ait de quoi vivre, comprend aussi la propriété entière de la maison, du fonds, ou du domaine, parce qu'autre chose est d'exprimer ainsi le motif ou la cause de la disposition, autre chose est de ne léguer qu'un simple droit de jouissance: *Illam autem adjectionem, ut habeant unde pascant, magis ad causam prælegandi, quàm ad usumfructum constituendum pertinere.*"

In this case, the batture, devanture, savane and cyprière are included in the grant, and it is far from being evident that the usufruct thereof was alone intended to be conveyed. Besides, as in the case cited by Proudhon, they are abandoned in perpetuity to the purchasers, pour en jouir. The conclusion, therefore, cannot be resisted that the ownership, and not the usufruct, was conveyed by the abandonment in the prospectus.

The case of *Pontalba v. The City of New Orleans*, 3 An., 660, is decisive of this.

But should it be held that there is no analogy between the two cases, I contend, upon the authority of Merlin, that the grant in this case is not even a grant *sub modo*. Merlin (*Vo. Mode*, no. 1,) says: "On confond quelquefois le mode avec la condition; il y a même des textes du droit romain qui donnent à l'un le nom de l'autre. Il y a cependant une différence entre le mode et la condition, et elle consiste tant dans la manière de les exprimer que dans les effets qui en résultent respectivement. La loi 80, D. de conditionibus et demonstrationibus, nous apprend en quoi la formule caractéristique de la condition diffère de celle qui désigne le mode. *Nec enim, dit-elle, parem dicimus cum cui ita datum est, si monumentum fecerit, c'est la condition; et eum cui datum est ut monumentum faciat, c'est le mode.* On voit par là que la particule *si* forme la condition, et que les mots pour, afin que, à la charge, caractérisent le mode. Mais, pour que ces mots forment une disposition vraiment modale, il faut qu'ils ne se rapportent pas uniquement à l'intérêt du donataire ou légataire. Ainsi dans le legs fait à quelqu'un pour étudier, pour se mettre en métier, ou pour l'aider à se marier, il n'y a point de mode, mais seulement une cause impulsive, dont le défaut d'accomplissement n'empêche pas le légataire de recueillir la

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libéralité du testateur, à moins que celui-ci n'ait manifesté une intention contraire. La loi 71, D. de conditionibus et demonstrationibus, porte que, 's'il a été légué à Titius cent écus pour s'acheter un fonds de terre. on ne doit pas lui demander caution pour l'exécution de cette clause, parce que elle ne concerne que son intérêt.' Now, under the distinction drawn by Merlin between a condition and a *modus*, it cannot be contested that the grant in this case would clearly be a grant *sub-modo*, had the disposition been intended for the benefit of the grantor or some other person not party to the act. But as that disposition was unquestionably intended for the sole and exclusive benefit of the grantees, then, as Merlin teaches, there is no *modus*, but a mere "cause impulsive," the non-compliance with which does not, nay, cannot destroy the grant. Under these circumstances then, as the disposition attached to the perpetual abandonment of the devanture, batture, &c., is not a *modus*, but simply an impulsive cause, the failure of which is not fatal to the grantees, the abandonment was intended to be, and therefore is, unconditional and absolute. That this abandonment, uncoupled with any *modus* or condition, does transfer the ownership of the things abandoned, cannot reasonably be denied.

*Roselius*, on the same side. In this examination it is to be borne in mind that the seller is bound to explain himself clearly respecting the extent of his obligations; any obscure or ambiguous clause is construed against him. (C. C. 2449.) This rule is fundamental, and as old as the law itself. Papinian, the prince of roman jurists, lays it down as follows: "Veteribus placet pactionem obscuram vel ambiguum venditori et ei qui locavit nocere, in quarum fuit potestate legem apertius conscribere." L. 39, De Pactis. See Troplong, De la Vente, vol. I, p. 347, no. 256. Hence it follows that, if the language used by the vendor in the present case be susceptible of different interpretations, that most favorable to the purchasers must be adopted.

In the prospectus it is stated, in the most explicit terms that the land in question, "is forever abandoned by the vendor in favor of the purchasers of the forty-two lots, to be enjoyed in common by them, with this sole condition, that the said purchasers shall send upon the pasture land in common not more than three head of cattle for each lot, and they shall cut and make wood in the cypress swamp for their own individual use, and not for the purpose of trade."

It is too clear to admit of serious controversy, that the expression "abandoned forever," as used in the prospectus as well as in the deeds of sale is synonymous to transfer or convey. They are words clearly indicative of an intention to alienate the thing itself; and utterly inconsistent with the idea of the grant of the mere usufruct or use of it. The well known axiom is, "nulli enim res sua servit jure servitutis." Dig. b. 8, 1, 2.

But it is urged that the meaning of the words which we are considering are modified, or rather entirely changed, by the succeeding branch of the same sentence, which is as follows: "to be enjoyed in common by them." It is said that these expressions clearly show that the enjoyment only, and not the thing itself, was intended to be conveyed. With what color of reason can it be pretended, for a single moment, that this useless direction given by the vendor to the purchasers, can destroy the absolute and perpetual abandonment of the property which he had just made? I say useless, for no one will deny that if these words had been omitted, the enjoyment in common would have been a necessary consequence from the fact that the abandonment had been made to them in common. Could there be any other enjoyment except in common by the proprietors, until a partition had taken place? It appears, therefore, quite plain, that the clause in the prospectus "to be enjoyed in common by them," can neither control nor modify the preceding clause translatif of the title of the property. Thus it is manifest that so far at least as the devanture and batture are concerned, there is no foundation whatever, even for a plausible argument in support of the interpretation which the learned counsel for the plaintiffs endeavor to give to the prospectus and deeds of sale emanating from *Willz*.

This brings us to the question, what is the legal operation of the concluding clause of the prospectus? It is clear that these directions in relation to the common enjoyment of the common property, were inserted in favor of, and for the benefit of the purchasers; and it is equally clear that this is a matter in which the heirs of the vendor have no interest whatever.

In what manner has this contract been executed by the parties themselves? How did they interpret it at the time of its date, and for upwards of forty

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years afterwards? There is not the slightest evidence that either *Wiltz* himself, or his heirs had set up any claim to this property until this suit was instituted. On the contrary, in 1824, one of his heirs, *Mrs. Arnauld*, in the sale to *Pierre Foucher*, expressly recognized the alienation which her father had made of this property. One of the safest rules of interpretation of a contract is the manner in which it has been executed by the parties themselves.

Lastly, what was the object which *Joseph Wiltz* had in view in abandoning the front and rear of his property in favor of the purchasers of the forty-two lots which he was about to sell? Evidently the enhancement of the price for which he would be able to sell these lots.

The counsel seem to rely with much confidence on the fact that the right of disposing of the property abandoned is not given in express words. The first answer to this argument is that the right of alienation is of the very nature of ownership, and need not be expressly conferred on the purchaser by the vendor; and in the second place, that property is sometimes so situated that it can only be alienated together with and as an accessory or appendage to other property. Such for instance, as a common alley, or the commons belonging to a city, town, village, or hamlet; these things cannot even be divided except by the unanimous consent of all the parties interested. *Toullier, Des Servitudes ou Services Foncières*, p. 204, no. 469 *bis*. *Pandects*, b. 10, tit. 3. law 19, § 1. "De vestibulo communi binarum aedium arbitrum communi dividundo invito utrolibet dari non debet: quia qui de vestibulo liceri cogitur, necesse habet interdum totarum aedium pretium facere, si aliam aditum non habet." Which I translate as follows: "The judge cannot order the partition of a common entry or alley to two houses without the consent of both proprietors; because he who is compelled to submit to the adjudication of the common alley to his coproprietor may thereby sustain the loss of his whole house, on the supposition that he cannot obtain another entry into his house." What is the difference in principle, between the case of a common entry or alley, put by *Paulus* in the text just cited, and that before the court?

The distinction between a servitude and such rights as the purchasers of the forty-two lots acquired to the property in dispute, is established with much force and clearness by *Toullier*, vol. 3, p. 332, no. 479.

*Proudhon, Traité des Droits d'Usufruit, d'Usage, &c.*, no. 8, lays down the same doctrine. Indeed, there is no diversity of opinion on the subject, for *Merlin*, (who, it was asserted, contradicted *Proudhon*), recognises the same distinction. *Merlin, Répertoire, verbo Communes*.

The next inquiry is, in whose favor was the sole condition established? who was to be benefited by it—the vendor or the purchasers? We contend that the land in front and in the rear was regularly conveyed to the purchasers of the forty-two lots, as an accessory; and was set apart as the commons of the inhabitants of the *Quartier de Plaisance*. These commons were transferred and dedicated by the founder of the village or hamlet to the perpetual use and benefit of its inhabitants. The *modus* or sole condition as it is termed, was imposed to establish a just and equitable rule by which the common enjoyment was to be regulated. This rule was laid down by the grantor for the benefit and protection of the grantees; and it is equally clear that the rule can be abrogated by the unanimous consent of those in whose favor it was established. No one has any legal interest in this property except the purchasers of the forty-two lots and their heirs or assigns; who then can object to its partition among those to whom it belongs. See *Merlin, Rep. verbis Communaux and Communes*. *Favard de Langlade, verbo Communes*. The authority cited by the counsel for the plaintiffs from the 3d vol. of the "*Jurisprudence Encyclopédic*," *verbo Communes*, p. 77, is to the same effect.

As *Joseph Wiltz* has divested himself of all title to the property, his heirs cannot maintain any action for its recovery; nor have they any interest to contest the right of the defendants to make a partition of it. *White v. City of Cincinnati*, 6 Peters, 431. *Barclay v. Harvell's Lessee*, 6 Peters, 498. *City of New Orleans v. United States*, 12 Peters, 662. *City of Lafayette v. Holland*, 18 La. 286.

*H. A. and H. B. Bullard*, on the same side. The only question in this case which the court is called on to decide is, what title or right did the purchasers of the forty-two lots acquire to or in the front lands, the pasture grounds and the cypress swamp, by their contract with *Joseph Wiltz*. On the part of the defendant, it is contended that each became, by purchase, the separate owner

of a lot as designated on the plan, and that, after all the lots had been sold, the purchasers acquired a right to the perpetual use and enjoyment of the other portions of the land as proprietors in common; and that the price they paid was equally the consideration for the separate property and for that portion which they were to hold in common. In other words, that the whole was a sale for a specific price, of the whole tract of four arpents front.

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Let it be remarked, *en passant*, that the sole condition set forth in the prospectus, related only to the common use of the pasture ground and the wood land. The front portion or *devanture* is not alluded to. That condition as it is called, is, in truth, a mere restriction upon the use of the pasture land and the cypress swamp, and was evidently intended to regulate their enjoyment by the purchasers, *inter se*. It is neither asserted, nor intimated, that there has been any violation of that restriction; that any proprietor has sent more than three head of cattle on the pasture, or made a commerce of fire-wood or timber. The violation of that condition is no where declared to involve any forfeiture to the grantors, of any rights acquired by the purchasers; and after *Wiltz* had parted with his whole property by a sale of the lots and the abandonment in perpetuity of the out lands, it is difficult to perceive what right he could have, or his heirs after him, to interfere with the purchasers. It appears then clear, that this was not a condition, properly speaking, upon which the title of the purchasers depended. It was not, in fact, a condition at all; it presents a clear case of *modus*, as distinguished from a condition; that is to say, a modification or restriction of the use or destination of the property, in other words, a sale *sub modo*.

Mackeldey, after stating what a *modus* is, goes on to say, that "it may exist as well in contracts or acts of beneficence, as in those of an onerous character; but it is to be remarked that, in the first (donations), the donor has a right, in case of non-execution of the mode, either to bring his action to compel performance, or for the restitution of the thing given; while in the second, (i. e. onerous contracts,) his action is limited to demand the execution or performance of the mode; but nothing obliges him who is bound to execute the mode, when he alone has an interest in it." Mackeldey, french translation, p. 102. In support of this doctrine, the author cites several authorities from the digest, to which I refer the court. Fr. 41, pr. D. 18. 1; Fr. 17, § 2, pr. 44 D. 40, 4; Fr. 13. § 2, D. 24, 1. See *Pontalba v. New Orleans*, in which the court recognizes this distinction. To apply this doctrine to the present case, if the contract between the parties was an onerous one, as appears quite clear, then the only action on the part of *Wiltz* or his heirs would be to compel the performance of the condition or *modus*, and not to rescind the contract, but in order to maintain such an action the plaintiff must show an interest in himself. Now, after all the lots had been disposed of, the purchasers alone had any interest in the manner in which the property should be used and enjoyed. *Wiltz* had no sort of interest in the matter. The purchasers for whose exclusive benefit that restriction was inserted, might dispense with or modify it to suit their own convenience. It never could injure *Wiltz* or his heirs, who even in the case of noncompliance with the condition, could at most compel a specific claim restitution of the property.

It is not, however, under the pretence that this sole condition has been violated, that the plaintiffs hope to recover. They have not set up in their petition any specific ground upon which they base their pretensions, but merely seek to avail themselves of the original title of their ancestor, as if he had either never been divested of title, or had been so only for a limited period, which has expired, and that they have the right to resume the property.

In argument it is distinctly avowed as the ground on which they expect to recover back the property, that the contract between *Wiltz* and the purchasers of the forty-two lots, gave to the latter only a right of usufruct in the out lands, and that, in consequence of an abuse of the use thus conferred, the grantors have a right to re-enter into possession as proprietors. The question thus presented, is one simply of interpretation of the contract between the parties. Was that contract one of sale of the whole tract, of the building lots as separate property of the purchasers respectively, and of the *devanture*, *ballurc*, *savane* and *cyprière*, as common and undivided property? Or was it a sale only as it relates to the separate building lots, and the establishment of a limited use and enjoyment of the remainder? On our part, we contend, that it was a

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sale of the whole, and the court has only to choose between the two hypotheses.

Let us again look at the the terms of the contract; for the intention of the parties is to be sought in the whole context of the act. In the prospectus it is said that the proprietor offers for sale the forty-two lots, and "abandons in perpetuity, in favor of the purchasers, to be enjoyed by them in common, the portion of devanture, batture, pasture ground, and cyprière, corresponding to the forty-two lots, and conformably to the title of the vendor. The acts of sale state a price paid for each lot, and for the perpetual use in common, of the out lands. The price applies as well to the out lands, as to the lots. The words of conveyance apply to both. In one of the acts, the two are coupled together as above stated: "Ensemble tous les droits de savane, batturs et cyprière attachés à ces mêmes terrains, conformément au prospectus," &c. These rights are treated as appurtenances of the lots [attachés.] It cannot be supposed that any of the purchasers would have bought, at least for the same price, a single lot, without an interest in the out lands which were abandoned to the purchasers, to be enjoyed in common. The whole contract was entire, and the whole land formed the object of it. If the plaintiffs now recover back the out lands, the purchasers will no longer have what they bought and paid for, but merely each his building lot, without the right attached to it by the contract. The contract of sale requires no sacramental form of words; it is enough if it contains the essentials of consent, price and object. The word abandon is used, but to abandon forever a thing for a price, is essentially as much a sale, as if the contract were clothed in all the verbiage of a spanish notary, and conveyed the property "con todos sus entradas y salidas, usos y aervidumbres." These principles are elementary, and I will not trifle with the court by citing any authorities in support of them.

In the prospectus itself, this portion of land not included in the lots, is treated as "*correspondante aux quarante deux terrains.*" I know of no proper translation of that clause which does not convey the idea—that of appertaining to, or appurtenant to the lots. The word correspond, applied to things, implies that one belongs to the other. Such were the expressions used by the spanish fiscals during the time of the Intendency, when they certified that the tract of land solicited, "*corresponde al dominio de S. M.*" The devanture, the batture, the pasture ground and the cypress swamp, formed a part of the four arpents belonging to *Wiltz*, and which he disposed of by the various acts of sale, referring to the prospectus. If the word *correspondante* has not that meaning, it has none.

It is an obvious and leading rule for the interpretation of contracts or conventions, that we are to seek for the common intent of the parties; and if there be any obscurity in any part of the act, it is to be construed with reference to the nature of the contracts—"secundum naturam negotii." Now, this purports to be a sale, and the whole partakes of the character of a sale. The word sale, may not be used in reference to the out lands, but the expression is that they are abandoned in perpetuity. "In conventionibus, contrahentium voluntatem, potius quam verba, spectari placuit." That the abandonment was in favor of the purchasers of the forty-two lots, is clearly expressed. That the grantor intended to part with his interest in the property forever, is equally manifest. The words in perpetuity, cannot be rejected as surplusage. Whether the contract be regarded as wholly onerous, or as partly gratuitous, (or a donation,) that expression stands in the way of the plaintiffs' recovery. Their ancestor parted with the whole property forever, and unless some new rule of interpretation be invented by the fruitful imagination of the counsel, the purchasers must be deemed to have acquired, in full separate property, the lots themselves, and a common property in the out-lands.

It is also a rule of interpretation that, obscure or doubtful expressions used by the author of an act, are to be explained according to his probable intention, which is to be sought in the language, the circumstances and the relation of the parties. Such doubtful expressions should be so interpreted as to depart the least possible from the nature of the contract, and against him who invokes or claims a right contrary to the nature of the contract, when he ought to have explained himself more clearly. "Contra eum qui clarius loqui potuisset, et debuisset."

The prospectus emanated from *Wiltz* alone; it was his sole work. If there be expressions in it which leave the least doubt as to his intention, the construction should be against him and his heirs. They now pretend that he gave

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to the purchasers of the forty-two lots only a limited or restricted right in the mere use of the out-lands, and that during a limited period, which period they say has expired. If that had been the intention of *Wiltz*, he might easily have used expressions which would clearly have conveyed that idea. He might have said he reserved some reversion to himself or his heirs—he might have suppressed the expressions *à perpétuité*, and made it expressly a limited interest or use. How could the purchaser of a particular lot imagine, from the terms of the prospectus, that he was acquiring a mere right to use for a limited period of time, those out-lands which *Wiltz* declared he abandoned in perpetuity? That a right which, whatever it may be, to or in the lands, was expressly declared perpetual and common to the purchasers, was intended by him to be limited to the lifetime of the purchaser? Agreements are to be construed, according to the doctrine of Paley, in such a way as the promissor had a right to suppose, from the language used, that his promise was understood by the other party.

But, it is contended on the part of the plaintiffs, if I understand the argument, that the purchasers of the lots were not invested with the *dominium* in the out-lands, because the *jus disponendi* did not pass by the abandonment. To that I answer, that although the *jus disponendi* is of the essence of full and perfect property, yet it does not follow that every contract by which the property in things is transferred should contain an express declaration to that effect. If A sells a slave to B, for a price, although nothing may be said as to the right of B to enjoy the fruits of his labor, and to dispose of him at his discretion, yet B acquires such full property by legal inference, and as the effect of the contract itself. “Une propriété,” says Pothier, “est pleine et parfaite, lorsqu’elle est perpétuelle, et que la chose n’est pas chargée de droits réels, envers d’autres personnes que le propriétaire. Au contraire elle est imparfaite, lorsqu’elle doit se résoudre au bout d’un certain temps, et par l’événement d’une certaine condition.”

Le droit de propriété considéré par rapport à ses effets, doit se définir le droit de disposer à son gré d’une chose, sans donner néanmoins atteinte au droit d’autrui niaux lois—jus de liberé disponendi, vel jus utendi et abutendi.” Dom. de Prop. 4, 8 *et seq.*

To construe the words, “pour par eux en jouir en commun” so as to restrict the interest conveyed to a mere temporary use of the thing, is either a begging of the question or a violation of every rule of construction. It supposes, that the absolute abandonment forever to the purchasers, is to be qualified by an expression as to the manner in which the property is to be enjoyed by them, to wit, in common and perpetually.

Nor can the expressions justify the pretence, that these out-lands became a *commune* in any legal sense of the word. On the contrary, they are to be enjoyed by the purchasers not by the public. All these authorities which have been referred to in relation to the division of *communes* have no application to the present case. The property is destined to the exclusive perpetual use of the purchasers, and even the grantor reserves no right whatever to or in them.

Every usufruct or use is essentially limited in time, because the very constitution of it is a dismemberment of property. It is limited either by the act or contract by which it is created, or by law. In relation to legal usufructs, such as the father's in the separate property of his children, the law itself, which establishes them, limits their duration. An usufruct in favor of a corporation, though unlimited by the terms of the grant, is restricted to thirty years by the existing law. An usufruct given in terms to an individual, if not otherwise limited, would terminate with his life. But it cannot be pretended that the forty-two individuals, who separately and at different periods purchased parts of this tract of land, and whose number by various sales, transfers and arrangements had been reduced to seven or eight at the time the partition took place, ever constituted a corporation or a community. They never composed when united together, one moral person. No voluntary connexion in interest of any number of individuals, without any sanction by law, can be treated as a corporation or community. A grant to them therefore must be regarded as a grant to individuals and not to a corporation; and consequently the legal restriction to a term of years does not apply. And indeed, how could the law in such a case be invoked to get rid of that fatal stumbling block in the way of the plain-

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tiffs, resulting from the express declaration that the abandonment is made to the purchasers, separately and individually in perpetuity?

In conclusion, I will simply say, that the manner in which the parties themselves carried out this contract, shows what their common interpretation of it was, at the time. *Wiltz* never required any security from the purchasers to insure their administration of the property, as bound by law, a right which he unquestionably had, if this be an usufruct or use. Such security is of the nature of the contract, though not of its essence, and may in all cases be required, when not expressly dispensed with by the contract by which the usufruct is constituted or by law. On the contrary, neither he nor his heirs ever interfered for nearly forty years. In the meantime various separate sales had taken place, reiterating the same conditions and terms.

*Jourdan*, for the town of Freeport, intervenors, appellants.

The judgment of the court (*Rost*, J. absent,) was pronounced by

*Eustis*, C. J. In the year 1807, the late *Joseph Wiltz*, the ancestor of the plaintiffs, laid out a part of his plantation in the present parish of Jefferson, into lots, and sold them to different persons according to a plan. The tract of land thus disposed of was four arpents front on the river, by forty in depth. The plan exhibits an avenue in the middle of the tract of one hundred and ten feet, and a row of lots on each side fronting on the avenue, making forty-two in number. Between the lots nearest to the river and the road a space was left undivided and vacant, as well as the batture in front; the remainder of the tract beyond the forty-two lots in the rear was in the same condition. There is written on the plan a prospectus, as it is called, which we thus translate :

“ Quartier de Plaisance : Plan of the plantation of *Mr. Joseph Wiltz*, two and a half miles above the city, divided into lots sufficiently spacious to establish country houses, taverns, gardens, etc.

“ Note : The lots numbered and colored in red are the only ones for sale at present. New Orleans, 22d June, 1807. Drawn by *H. Laclotte*, architect.  
(Signed) J. WILTZ.”

“ Prospectus.

“ The portion of the front, of the batture, of the pasture and of the cypress swamp, corresponding with the forty-two lots offered for sale at this time, and in conformity with the titles of the vendor, is abandoned in perpetuity in favor of the purchasers, to be by them enjoyed in common, with this sole condition, that the said purchasers shall not send in the common pasture but three head of animals for each lot, and shall cut wood in the swamp for their private use only and not for sale.” Provision is then made that the trees in the avenues shall be planted, and the ditches and roads shall be made by the purchasers.

The whole of the forty-two lots were sold to different persons in accordance with this plan, and under the conditions of this prospectus. In January, 1838, the proprietors made a partition of the front, the batture, and the rear of the tract, which they held under their several purchases of lots. The present suit is brought by the plaintiffs, the heirs of the original vendor, against the defendant, who holds under the sales made in conformity with the plan and prospectus, to recover those portions of the original tract, on the ground that the right of property was not transferred by their ancestor by the sales of 1807, but a right of use only, and that the right of use has terminated by reason of the acts of the defendant. In the District court the plaintiffs recovered judgment for all that portion of the tract to which the district judge held the right of use only to extend, to wit : the batture, the space left in front, and the land in the rear of the forty-two lots. From this judgment the defendant has appealed.

The first question to be determined, and upon which all the others presented

in argument depend, is the title acquired by the original purchasers of the lots laid out and sold by the plaintiffs' ancestor.

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It is conceded that the defendant is the owner of some twenty-two of the forty-two lots, which she holds by divers conveyances under the original title from *Joseph Wiltz*, given under the plan and prospectus before mentioned; and that the plaintiffs are not at present owners of any portion of the forty-two lots, and were not at the time of the partition spoken of in 1838. The position of the defendant is, that the plaintiffs have no right, title, nor interest in the land sued for, to wit: the front, the batture, the pasture land and the cypress swamp, the same having been sold by the plaintiffs' ancestor with the forty-two lots, the whole forming the plantation divided into the Quartier de Plaisance.

If we consider the language made use of by the vendor in disposing of this property, it certainly has the appearance of doing violence to its obvious sense, to insist that he intended to reserve, or did reserve, any title or interest adversely to the purchasers. Terms more absolute, definite, or comprehensive, could scarcely be used to indicate a complete divestiture of all right in the property on his part. *He abandons in perpetuity*, in favor of the purchasers, the land in front and in the rear of the lots. The term abandonment excludes any reservation as to the title, as positively as the term perpetuity excludes any limitation of time. Indeed, the terms used appear to express fully the obligation of the vendor under the roman law—*præstare emptori rem habere licere*.

But it is contended by the counsel for the plaintiffs that the condition, that the purchasers of the lots shall only be allowed to send to the common pasture three head of animals, and to cut wood for their own private wants, creates an use merely in the purchasers, and that the only interest conveyed to them was the right of use or at most a right of usufruct. The most formidable objection to this construction is that presented by the contract itself, which is strengthened by the sense which both parties have acted upon up to the time of the institution of this suit.

In ascertaining the meaning of the terms used, and whether an usufruct only has been created by them, the diligence of counsel has brought to our aid the opinions of several authors who have treated the subject of usufruct in the language in which the contract under consideration is written.

Proudhon considers that perpetuity is contrary to the very essence of usufruct, and if the entire enjoyment of an estate has been expressly bequeathed in perpetuity to a community, the right bequeathed would have only the name of usufruct, and the property itself would pass by the description. He lays it down as a rule that, when in a testamentary disposition the gift is expressly intended to be perpetual, it does not create a mere right of usufruct, but conveys the ownership itself. The usufruct being essentially temporary, it is necessarily excluded by the perpetuity which the testator has established. It appears that the usufruct only is conveyed in cases in which the separation of the right of enjoyment from the right of ownership is clearly expressed in the act. In this view the authors who have written on the subject hold, according to the texts of the roman law, that the legacy of a house to inhabit it, that of an estate to enjoy it, that of a domain in order that the legatee may have where-with to live, comprehends also the entire property of the house, the estate, and the domain, because it is one thing to express the motive or the cause of the bequest, and another to bequeath only the simple right of enjoyment. Proudhon, *Traité d'Usufruit, loc. cit.*

We think the opinions of this author on this subject are in accordance with



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others of authority cited by the counsel for the defendants. In the case of *Pontalba v. The Municipality*, recently decided by this court (3 An. p. 660), we held the property itself to pass to the donee under a donation, the effect of which was far less clear as to its vesting the property than the sale under consideration appears to us to be. Under this interpretation we cannot say that *Wiltz* retained the property in dispute, and conveyed merely the usufruct of it to the purchasers of the lots. If, in a testament or donation, the terms made use of would transfer the property, we see no reason why they should not be held to the same meaning in the contract of sale, where every thing embraced in it formed a constituent part of the price.

But if no usufruct was created, it is urged by the counsel for the plaintiffs that the purchasers of lots acquired in the batture, front, pasture ground and cypress swamp, no other right than a right of use.

The abandonment in perpetuity of these objects, as we have seen, was made in favor of the purchasers of the lots to be by them enjoyed in common, with this sole condition, that the purchasers shall not send into the common pasture ground more than three head of animals for each lot, and they have only the right to cut wood in the cypress swamp for their own use and not for sale.

It seems to us that the question presented by this position of counsel is already determined by the conclusion which we have adopted, that the right of property was not reserved to *Wiltz*, but passed, by the sale, to the purchasers of the lots. This right of use was confined to the pasture ground and the cypress swamp, and did not extend in its terms beyond them. The condition evidently was intended to regulate the use of them among the purchasers, and purported nothing else. It was a regulation considered advantageous in order to enable each one to use the common property without detriment to it, or annoyance to each other. There is nothing unusual in it, nor does it conflict with any of the avowed objects of the sale, but is in furtherance of them all.

If there were any doubt concerning the extent and meaning of the terms made use of in this contract, the law would oblige us to construe them against the seller. The vendor is bound to explain himself clearly as to the extent of his obligations, and an obscure or an ambiguous clause must be interpreted against him. C. C. 2449.

We think the plaintiffs are without any right, title, or interest in the land which is the subject of the present suit.

The corporation of the borough of Freeport, within which the land in dispute is situated, has appealed from the judgment of the District Court in favor of the plaintiffs, and has appeared by counsel, who has presented an argument in writing in behalf of said corporation. The corporation claims the property in dispute as public, on the ground of its having been dedicated to public use by the prospectus, plan, and sales aforesaid, all of which were recorded in the office of a notary public.

The evidence in this case does not establish a dedication of this kind to public use, and the corporation of Freeport has no interest whatever in this suit. Neither party has moved to dismiss this appeal; the party is before the court, but has adduced nothing which affects the rights of the defendant.

The judgment of the District Court is, therefore, reversed, and judgment rendered for the defendant, with costs in both courts.

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A creditor for money loaned to a contractor for the erection of buildings is not within the stat. of 18 March, 1844. No privilege is conferred on such a creditor by that statute.

The stat. of 18 March, 1844, confers on mechanics, laborers, and furnishers of materials a privilege on the amount due by the proprietor, and a privilege on the building. If the contractor has not secured himself a privilege upon the building by recording his contract, he must rank as an ordinary creditor of the proprietor, and the mechanics &c. cannot be subrogated to a privilege which does not exist; but this does not effect their privilege on what the proprietor owes.

Decision in *Allen v. Wills*, ante p. 97 as to costs affirmed.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preaux*, for the appellants. *Roselius, Latour, J. and H. H. Straubridge, Bradford, Collens, and Halsey*, for different defendants. The judgment of the court (*Rost, J.* absent,) was pronounced by

SLIDELL, J. The present complicated controversy grew out of contracts made by the plaintiff with *Bell*, for the erection of certain water works. The contractor neglected to pay the workmen and persons who furnished materials, and they notified their claims to the municipality, under the act of 1844. The municipality, on the other hand, disputed the claims of the contractor. Suits were brought by the workmen &c.. against the contractor: and then this suit was instituted by the municipality against *Bell* and the creditors who had given notices, with which suit the other actions were consolidated. The municipality stated what it considered the amount of its indebtedness, and called upon the creditors to litigate *inter se* as to its distribution.

The district judge correctly stated the whole liability of the plaintiffs to the contractor at \$25,260. A portion of this was allowed for extra work, nor comprehended by the specifications. This branch of the cause was submitted to experts, and the court adopted their report. No sufficient reason has been presented for setting aside the report. But the plaintiffs resist that portion of the claim upon the ground that it was not embraced by the original contracts and specifications, which were formally signed by the mayor, by virtue of proper resolutions of the council. The absence of a formal antecedent authorization by the council is cured by what subsequently occurred. It is satisfactorily shown that the works, which were of a complicated nature, were not fully provided for by the original specifications. Changes were found to be necessary, during the progress of the work, in the arrangement and adaptation of the machinery &c. These changes resulted in an increased expenditure, which, however, was attended with beneficial consequences. The water works, in consequence of these changes, became more efficient than they would have been according to the original specifications; and the object of the undertaking was more fully accomplished. The work was carried on under the supervision of the municipal surveyor, and at length was received by the municipality, as its ordinances show, and has been for sometime used by it. Under such circumstances to refuse to pay for the contractor's labor is inadmissible. The public has been benefitted, and the subsequent municipal ratification is as binding as an original authorization.

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The amounts of the claims of the various creditors of the contractor, in whose favor the court below gave judgment, are not disputed by the plaintiffs, who are appellants in this cause. But the plaintiffs contend that the amount for which they are made liable to them is too large. The controversy in this respect turns upon the question whether certain payments made to the contractor were anticipated. We find no error in the opinion of the district judge on this point. When the payments in question were made, the disputed instalments were not due under the contract.

All the notices were delivered before the 24th May, 1847, except one, which was delivered on the 4th June. It does not appear that, even at that date, the works were completed. In a resolution of the council, on the 24th May, 1847, it was expressly acknowledged that the works were then incomplete, and had not been accepted by the surveyor. See the case of *Allen v. Wills, et al.* ante p. 97.

Only one of the creditors of *Bell*, whose claims were rejected by the district judge, has appealed. *Judson's* claim was not for labor or materials; but arose from a loan of money to the contractor. He obtained a judgment against *Bell*, and made a seizure under *fiery facias* in the hands of the plaintiff, in February, 1848. His claim is not within the statute of 1844. He had no right against the plaintiff by reason of the nature of his debt. The anticipated payments are valid against him. He could only acquire such privilege as results from a seizure under execution; and as the entire fund due to his debtor was absorbed by the claims of creditors who were within this statute, his pretensions to participate in the fund were properly rejected.

*Judson* argues that the workmen &c., acquired no privilege upon the fund, because the contracts were not recorded. The argument confounds the privilege upon the amount due by the proprietor with the privilege upon the building. The provision for the benefit of that class of creditors is twofold; a right of preference upon the amount due for the work, and a privilege upon the building. If the contractor has not secured himself a privilege upon the building by recording of his contract, he must rank as an ordinary creditor of the proprietor, and the workmen &c., cannot be subrogated to a privilege which does not exist. But this does not effect the privilege of the workmen &c., upon what the proprietor owes. The rights are obviously distinct. The one enables the workmen to take rank over the creditors of the proprietor, the other over the creditors of the contractor. The latter privilege may exist without the former.

Considering the unliquidated nature of the plaintiffs liability to the contractor, and the peculiar circumstances of this litigation, we do not recognize the right of the creditors to interest, except from the date of the decree establishing the amount due for the work and the rights of the claimants.

Under the ruling in *Allen v. Wills*, the plaintiffs must pay the costs of the present suit.

It is, therefore, decreed that the judgment be so amended as to allow the said *Dana, McGiniss, McCabe, Drummond, and Leeds & Co.*, against the said plaintiffs, interest on the respective amounts decreed to be paid to them by the plaintiffs, from the date of the judgment in the court below until paid, together with the costs of this suit in the court below, and one half of the costs of this appeal. It is further decreed that, the plaintiffs do recover from the said *Bell*, such other sums as the said plaintiffs shall pay for interest to said creditors un-

der this decree, with right of execution against said *Bell*, when the same shall be paid. It is further decreed that, the costs of the other suits, accrued before this consolidation with this suit, be paid by said *Bell*, except those of the suit of the said *Bell* v. the said *Municipality*. It is further decreed that, the judgment as to said *Judson* be affirmed, and that he pay one half of the costs of this appeal. It is further decreed that the judgment of the District Court as now amended, be affirmed.

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### McCOMAS, Tutrix v. RONQUILLO, Administrator.

It is no objection to the right of a tutrix of the minor heirs to sue for the removal of the administrator for neglect of his duties, that the plaintiff, although an order had been made for her appointment as tutrix, had not furnished the bond and security required by law. Art. 332 C. C., the object of which is to prevent the tutor from assuming the administration of the minor's estate before furnishing the required security, does not apply to an action for the removal of an administrator. Proceedings for that purpose are governed by art. 1018 C. P., which authorizes an heir, creditor, or other person concerned, to pray for the removal of an administrator.

Technical objections opposed to investigations into the conduct of administrators are entitled to little favor.

**A**PPEAL from the District Court of Plaquemines, *Rousseau, J. Frost*, for the appellant. *Lambert*, for the defendant. The judgment of the court was pronounced by

**KING, J.** The plaintiff, representing herself to be the tutrix of the minor children and heirs of *James and Eliza Lee*, instituted this action to remove the defendant from the administratorship of the succession of the deceased, alleging that the defendant had been guilty of gross neglect of his duties. The defendant excepted to the capacity of the plaintiff to maintain the action, averring that she had not been appointed the tutrix of the minors, and was without authority to interfere in the administration. The district judge sustained the exception, on the ground that the plaintiff had not furnished the bond and security required by law as tutrix, and that letters of tutorship had not been delivered to her, although an order for her appointment had been made. The petition was dismissed, and the plaintiff has appealed.

The defendant relies on the 332d article of the Code, which provides that, until letters of tutorship shall have been delivered to the tutor, he shall not interfere with the administration of the property of the minor, except for the purpose of preserving it in cases which admit of no delay. The object of this article is to prohibit the tutor from assuming personally the administration of the minor's estate, previous to furnishing the required security. It has no application to controversies for the removal of administrators for alleged misconduct. Proceedings of this kind are governed by the 1018th article of the Code of Practice, which authorizes an heir, creditor, or other person concerned, to pray for the removal of an administrator.

The plaintiff is the grand mother of the minors; she is entitled to the tutorship, which she has claimed, and an order for her appointment has been made,

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| 104 | 578  |

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and she has actually taken the required oath, although no bond has as yet been given.

She is concerned in the proper administration of the succession which has devolved upon the minors, and it is her duty to protect their interests. The spirit of our legislation is to lend every facility to examine into the conduct of administrators, and we may observe that technical objections opposed to such investigations are entitled to little favor. 2 La. 266. 19 La. 32. C. P. 1016. C. C. 1151.

But it is contended that, if the plaintiff can interfere, her authority is limited to informing the judge of the facts which rendered the removal of the administrator necessary; that further proceedings can only be prosecuted upon the direction of the judge, and that no order to that effect has been granted. C. P. 1016.

This exception was not taken in the court below, and the proceedings were not permitted to reach the point when it could have been urged. It is made by law the duty of the judge to direct proceedings to be instituted against an administrator, or receiving information of his misconduct, and it is to be presumed that the requisite order would have been made if the judge had not been met at the threshold with an objection, which he supposed to be valid, to the right of the plaintiff to interfere for any purpose. The exception, in our opinion, should have been overruled.

The judgment of the District Court is therefore reversed, and the cause remanded to be proceeded with according to law; the defendant paying the costs of this appeal.

#### BROWN v. GLATHARY.

By the law of Kentucky where, under an absolute bill of sale of a slave, possession remains in the vendor, such possession is not merely *prima facie* evidence of fraud, but renders the sale fraudulent *per se*, and inoperative against creditors of the vendor who had no notice at the time of trusting the seller. But when possession is taken by the vendee before third persons have acquired any rights, the fact of the anterior continued possession would not be regarded as any thing more than a suspicious circumstance, to be considered in appreciating the subsequent conduct of the parties. And, supposing the sale to have been real and in good faith, where the vendee, some time after the sale, takes possession of the property and holds it for several months, the reacquisition of possession by the vendor under a lease would not subject the property, in Kentucky, to the pursuit of creditors of the vendor who became such after the lease; nor would the purchaser lose his rights, as against the creditors of the lessee, by permitting the lessee to bring the property into this State, although the possession and declaration of the lessee, that he was owner, may have induced them to trust him.

**A** PPEAL from the District Court of Carroll, *Selby, J. Dupuy*, for the plaintiff. *Short and Thomas*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. In 1838, *William Craig* married, in Kentucky, *Eliza Brown*, the sister of the plaintiff; and became, according to the law of that State, the owner of a slave called *Fanny*, then belonging to his wife. In 1842, *Craig* sold the slave and her child *Ellen* to the plaintiff, by a written bill of sale, acknowledging the receipt of the price, \$450. The execution of this instrument, and the payment of the money at the time, is proved by the subscribing witness.

In the latter part of 1846, *Brown* hired to *Craig*, *Fanny*, and her two children born after the purchase. *Craig* was then going to Louisiana to do certain work as a carpenter, and took the slave *Fanny* with him as a cook, it being understood that he should bring her back on his return. The child, *Ellen*, remained with the plaintiff.

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*Craig*, on his arrival in Louisiana, in 1847, held himself out as the owner of *Fanny* and her children. He fell in debt here to the person with whom he had contracted to build a house and to other persons. He also, on his departure in the summer of 1847, hired the slaves to *Glathary*. The Louisiana creditors brought suit against him by attachment, and seized the slaves. They were also seized on *feri facias*, and sold to *Glathary* by the sheriff.

There is no doubt, under the evidence, of the execution of the bill of sale and the payment of the money; but the difficulty arises from the fact of the continued possession of *Craig*, the vendor. It is not shown that the slaves were actually delivered at the time of the sale. It is proved that they were in *Craig's* possession down to 1845. The plaintiff alleges that in was under a contract of hire, but this is not satisfactorily proved. It appears, however, that *Brown* was in possession of them in 1845, and held possession eight or nine months, when they were hired by *Brown* to *Craig* as above stated, and brought by him to Louisiana.

From the evidence offered at the trial it would seem that, according to the existing jurisprudence in Kentucky, the doctrine is more stern than formerly prevailed there; and that when, under an absolute bill of sale, possession remains in the vendor, such possession is not merely *prima facie* evidence of fraud, but so contaminates the transaction that it is deemed fraudulent *per se*, and inoperative against creditors of the vendor who had no notice at the time they trusted the seller.

If the doctrine, however, be conceded in the fullest extent to which the testimony carries it, it seems to us not to cover a case where the creditor trusts after the possession is changed. The policy of the law is to protect third persons from being deceived and injured by the false aspect in which the vendor is permitted to present himself before the public. When the possession is taken by the vendee before the rights of third persons intervene, the fact of the anterior continued possession would not be regarded at most as more than a suspicious circumstance, to be considered in appreciating the subsequent conduct of the parties.

Having taken possession of the property in 1845, and continued in possession for several months, the reacquisition of possession by *Craig* under a lease would not have subjected the property in Kentucky to the pursuit of his creditors, who became such after the execution of the lease, always supposing that the sale was real and in good faith.

If such would have been the rights of the plaintiff in Kentucky, has he lost them by permitting the lessee to bring the property into this State? We think not; for our law permits slaves to be leased, and the proprietor would not lose his rights in favor of the lessee's creditors, although the lessee's possession and his declarations might have induced them to trust him.

We have considered this case upon the assumption that the sale by *Craig* to *Brown* was real and fair. This was the conviction of the district judge, and, under the testimony adduced by the plaintiff, we cannot say it was unauthorized. We have said that it is not satisfactorily proved that *Craig* hired the slaves immediately after the sale in 1842. The testimony on that point is at

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best vague; but even without a hiring, the near relationship existing between *Brown and Craig's* wife, who once owned them, was a circumstance which may, in connection with the other evidence, have relieved the case in the opinion of the district judge from suspicion on that score. We cannot reverse his opinion without discrediting two witnesses whom he believed, and whose testimony was not impeached at the trial.

*Judgment affirmed.*

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GRAVES v. ROUTH, Administrator.

Claims of creditors which have been presented to the administrator but have not been admitted to be due, and which have not been prosecuted by suit, afford no ground for withholding from the heir money in the hands of the administrator (stat. of 25 March, 1828, § 16); nor are such creditors entitled to notice of the demand of the heir to be put in possession.

A note not payable to order or bearer, is not prescribed by five years. C. C. 3505.

**A** PPEAL from the District Court of Concordia, *Farrar, J. McWhorter, Thomas and Snyder*, for the plaintiff. *Stacy and Sparrow*, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiff, *Sarah Graves*, has instituted this action, as the sole beneficiary heir of *Disharoon*, to compel the defendant to render an account as administrator of the succession which has devolved upon her, and to pay over to her the balance appearing to be in his hands, together with the remaining assets of the succession. The defendant rendered his account, exhibiting demands of the succession still uncollected, and debts to a large amount unpaid; and, in his answer denied the right of the plaintiff to be put in possession, until the succession shall have been fully administered. Several oppositions were filed, and among the number was that of the administrator of *Ducker's* succession, who claimed to be a creditor for a large sum, and prayed judgment for the amount, to be paid in due course of administration. He also opposed the delivery of possession to the plaintiff, pending the litigation upon his claim.

*Ballard* also opposed the account, alleging that he was a creditor for the amount of two promissory notes, both of which had been recognized by the administrator to be due. To these notes the prescription of five years was opposed. The plaintiff having made no offer to furnish bond and security for the sums claimed by creditors which were still in suit, the district judge decreed that the administrator should retain in his hands a sum sufficient to pay the claims then pending upon oppositions, and to await the result of the litigation in relation to them. He also rendered a judgment in favor of *Ballard* for the amount of his notes, with interest computed at eight per cent, from the dates of their respective maturity.

The administrator has appealed. He contends that the plaintiff is not entitled to possession, in as much as there remain numerous claims of creditors unpaid. These claims have been presented to the administrator, and a list of them has been appended to his account, but they have not been acknowledged by him, nor been ordered to be paid, nor have suits been brought upon them. It is also contended that these alleged creditors should have been notified of

the heir's demand to be put in possession, that they might have claimed security before the delivery, and that no such notice has been given.

The statute of 1828 (Acts, p. 156, § 15), provides that the heir shall not be permitted to have actual delivery of any property of the succession claimed *which may be in suit*, or to receive the proceeds of any monies of the succession, when there shall be *claims thereon pending in court*, unless he previously gives good and sufficient security, if the plaintiffs in such suits require it.

The claims of creditors which have been presented to the administrator, but not admitted to be due, and which have never been prosecuted, can in no sense be considered as in suit, or as pending in court, merely because the administrator reports, in his account, the fact of their presentation, and can afford no ground for withholding from the heir monies in the hands of the administrator. If any creditors be entitled to notice of the demand of the heir, it certainly cannot be those who have acquiesced for years in the refusal of the administrator to admit the justice of their claims, and have manifested no intention to prosecute them. Those creditors have not appeared, and the administrator has no authority to interfere in their behalf. See *Succession of Fisk*, 3 Ann. 705.

But the plaintiff and defendant have asked that the judgment of the inferior court be amended, by rejecting one of the notes held by *Ballard*, which it is contended is extinguished by prescription. The note is not payable either to order or bearer, and is not subject to the prescription of five years. C. C. art. 3505. It is not pretended that any other prescription is applicable.

*Judgment affirmed.*

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WOODRUFF et al. v. ROBERTS et al.

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| 4  | 127  |
| 46 | 1636 |
| 4  | 127  |
| 50 | 1008 |

One who purchases from the government a certain number of acres of public land on which there was at the time wood cut and corded, has no claim to the wood, which had been separated from the land and was moveable at the date of the purchase. The rights of the government were not transferred to the purchaser. C. C. 454, 456, 457, 459.

**A** PPEAL from the District Court of Carroll, *Selby, J. Mathewson and Browder*, for the appellants. *Walker*, for the defendants. The judgment of the court was pronounced by

ROST, J. This is a petitory action, in which the plaintiffs allege that they purchased the land claimed from the government of the United States, in March and April, 1845. They further claim six or seven hundred cords of wood which had been cut from the timber upon the land, and were found thereon at the time of the purchase. The defendants filed a general denial, and farther alleged that they purchased the land in controversy about the 1st February, 1844, from the plaintiff, *Philander Woodruff*, by a verbal sale for the sum of \$150; that the plaintiffs are bound in warranty to pay them back the price, and also the value of their improvements. They further answer that the wood claimed does not belong to the plaintiffs, because it was cut before the purchase of the land by them, and that, if they recover said wood, they should be made to pay the defendants its value. The title of the plaintiffs to the land is not seriously contested, and the only question before us is in relation to the ownership of the



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cord-wood. The case was tried before two juries, who both gave the wood to the defendants, and the plaintiffs have appealed from the judgment rendered on the last verdict.

The title adduced by the plaintiff is a receipt of the receiver of the land office for the sum of \$206 91, being in full for the lot or fractional quarter of section no. 23, island no. 92, in township north 23, of range no. 13 east, containing one hundred and sixty-five 53-100 acres, at \$1 25 per acre.

This is a sale of land, and nothing passed under it but the land and the things found upon it, which were immovable by their destination or by the object to which they were applied. C. C. 454, 456, 457, 459.

In the case of *Nimmo v. Allen et al.*, 2 Annual, 451, in which a similar question came before the court, we held that the purchasers under a judicial sale of land had acquired no title to staves, pickets, boards and cypress logs which were upon the land at the time it was sold. That case cannot be distinguished from the present. The cord-wood claimed by the plaintiffs had been separated from the land, and was movable at the date of the plaintiffs purchase. The rights which the United States may have had upon it were not transferred to them.

*Judgment affirmed.*

### KLING v. SEJOUR et ux.

Where one who had purchased real estate in a State in which the common law prevails, with full warranty, is evicted in an action of ejectment instituted by a third person, and, without contesting the claim of the latter in the court of the last resort, purchases his claim before delivery of the premises by the sheriff to such third person, his recourse against his warrantors will not be thereby affected. The submission to the judgment by an attornment was no waiver of the right to prosecute the writ of error; the rule that the voluntary execution of a judgment or decree is a waiver of, or bar to, an appeal or writ of error, has no place in the common law. Nor was the purchase from the plaintiff in ejectment a release at law of the errors in the judgment, nor could it be pleaded in bar of a writ of error prosecuted for the exclusive benefit of the purchaser.

By the common law one judgment in ejectment is no bar to another, and not being a decision on the mere right does not prejudice the proprietor in his assertion of it in a higher degree of action.

What constitutes title and what seizin, or, in the language of our law, the possession as owner of immovable property, must be determined by the law of the place where it is situated, and that is the only law which can determine whether a covenant of title and seizin has been broken or not.

A covenant of warranty, in an act of sale executed here, of land in another State, is a contract to be performed in that State, and what amounts to a fulfillment or breach of it must be determined by its laws.

To recover against a vendor of real estate on his covenant of warranty, under the laws of Mississippi, the purchaser who has been evicted by a judgment, in the absence of notice to the vendor of the former suit, must show that the recovery was by a title paramount to that conveyed to him.

Where a purchaser of land is evicted by a third person under a judgment in an action of ejectment, if his vendor defended the action himself or by an agent authorized to represent him in the matter, or if he had sufficient notice of the institution of the action so that he might have defended it, his covenant of warranty, by the law of Mississippi, is broken; otherwise the judgment will not be binding on him.

In an action against a vendor of real estate situated in another State on a covenant of war-

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| 4   | 128  |
| 50  | 1265 |
| 4   | 128  |
| 105 | 712  |
| 4   | 128  |
| 107 | 569  |
| 4   | 128  |
| 114 | 716  |

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ranty in the act of sale executed here, founded on an eviction by a third person under a judgment rendered in that State, the notice of the institution of the action by such third person required to be given to the vendor in order to render the judgment conclusive as to the breach of warranty, must be such as the laws of that State require, and not such as would be necessary under our law had the land and action been in this State. The provisions of arts. 2493, 2494, C. C., which bind the vendor by a judgment of eviction against the purchaser even in the absence of a notification of the suit, unless the vendor show that he possessed proofs which would have sustained his title, and which, for want of such notice to him, have not been made available, does not apply to such a case.

**A** PPEAL from a judgment of the Fifth District Court of New Orleans. *Buchanan, J.*, in favor of the defendants. *Henderson and Roselius*, for the appellant. No counsel appeared for the defendants. The judgment of the court was pronounced by

*EUSTIS, C. J.* In 1843, the defendants, in the city of New Orleans, sold to the plaintiff a tract of land situated at the bay of St. Louis, in the State of Mississippi, including the establishment called the St. Louis Hotel, in consideration of the sum of \$4,180, and delivered to him possession. The sale was by authentic act, but in the form denominated, by the common law, a deed of bargain and sale, and contains a full warranty of title on the part of the vendor. The plaintiff alleges that, since he has taken possession of said land, a suit has been instituted against him in the Circuit Court of Hancock county, Mississippi, for the recovery of the possession, and that judgment was rendered against him for its possession. The suit it appears was an action of ejectment in the name of *John Doe*, on the demise of *John Henderson*, against *Richard Roc*, i. e. *Michael Kling*, and the plaintiff alleges that he was ejected and evicted from said land by said judgment. It is also stated that the defendant *Sejour* was cited in warranty, and actually defended the suit by his counsel. The action is based upon this judgment and eviction as a breach of the warranty, for the recovery of the purchase money, etc. The judgment of the District Court was against the plaintiff, and he has taken an appeal.

The judgment in ejectment against *Kling* was rendered, in April, 1845, and it appears that, on the 26th of September, the day before the delivery of possession by the sheriff to the plaintiff in ejectment, *Kling* bought out the title of *Henderson* under a general warranty. The district judge considered this contract between *Kling* and *Henderson* as inconsistent with *Kling's* recourse against his warrantors, *Séjour* and wife, which is sought to be established in this suit, and accordingly gave judgment for the defendants. We do not concur with the view taken of the rights of *Kling* as affected by purchasing *Henderson's* title. The land was in the State of Mississippi, the action of which complaint is made was brought there, and the rights of *Kling* must be determined by the laws of that State in which we assume the common law to prevail.

It was not necessary for *Kling* to contest the validity of *Henderson's* claim in the court of the last resort, in order to entitle him to his action on the covenants of the vendor. The judgment of the court of competent jurisdiction is presumed correct, whenever introduced collaterally in a court of the same State or another State. This is not affirming that it is proof against other parties, on a question of the right adjudged. That depends on facts which may or may not be in the record, the determination of which can only bind parties and privies, or quasi parties, who had opportunities to contest or avoid the facts alleged. It was equally unnecessary for him to suffer an actual eviction from the premises by the execution of the writ of *habere facias possessionem*.

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*nem.* He might have well attorned to the plaintiff after the judgment. The submission to the judgment by an attornment was no waiver of the right to prosecute a writ of error. The rule that the voluntary performance of a judgment or decree is a waiver or bar to an appeal or writ of error, has no place in the common law.

The purchase by *Kling* of the land from *Henderson*, the plaintiff, falls equally short of a release at law of the errors in the judgment. It could not be pleaded in bar of a writ of error, even a writ prosecuted for the exclusive benefit of *Kling*; and whatever effect this transaction might have against *Kling* in any contest between *Henderson* and himself, it is very clear it could not effect the rights of *Séjour*. If the judgment is not now reversible, another ejectment, or a writ of right may be maintained, if the right be good. One judgment in ejectment is no bar to another, and not being a decision on the mere right does not prejudice the proprietor in his assertion of it in the higher grade of action.

This case then depends on the question, whether the defendants have kept or broken their covenants in the act of sale to the plaintiff, which are of seizin, good title and warranty. The covenants of good title and seizin of the premises are affirmation covenants of present existing facts, and in this case were broken the instant the act of sale was delivered, or they have been ever since kept and will ever remain unbroken.

It is plain that what constitutes the title and what the seizin, or, in the language of our law, the possession as owner of immovable property, is determined by the law of the place where it is situated; and, in as much as the breach of the undertaking or falsehood of the affirmation that the seller had just title, is the absence in him of what constitutes it, the law in force over the property is the only law which can be appealed to for the purpose of ascertaining whether the covenant has been broken or not. It is then by the law of Mississippi, that we must determine whether these covenants of good title and seizin have been kept or broken by the defendant. The covenant to defend the title or of a warranty, is an undertaking on the part of the grantor that he will defend the property against all lawful actions. This could only be done in the courts of Mississippi, and therefore this covenant is a contract to be performed in that State, and, by the express provisions of our Code as well as by the *jus gentium*, what amounts to its fulfillment or its breach must also be determined by the law of that State.

It has long been settled in this court that we will take judicial notice of the common law of Mississippi, and as we have found nothing in the statutes the parties have by their consent admitted might be read here, nor in the depositions or admissions of the parties in the District Court, which varies the rule of that law applicable to this case, we proceed upon our own knowledge of the law, which governs the whole case, without advertent to any evidence or admission of it in the record.

We have acted on the supposition that the plaintiff has in his proceedings sufficiently assigned breaches in all the covenants. This certainly would not be the case were this an action of covenant broken in a common law court, but the forms of proceedings in courts are governed by the law of the forum, and this petition must be tested by our Code of Practice. This petition is certainly not very clear, and it is not very certain of what the plaintiff intended to complain, but according to the best construction of its language it amounts only to an allegation that the property when purchased by him was encumbered by what

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we would denominate a mortgage; and, an action of ejectment having been brought upon such claim and a judgment recovered, he had been thereby evicted. It is not alleged that the defendant was not seized of the land, nor in possession of it as owner, nor that he had no title to it, nor that his title was defective, otherwise than that his *estate* in it was *burthened* by the payment of some debt; and when the documents which he exhibits and his evidence are examined, it is found that he only proposed to establish that the property had been encumbered by a debt owing by the former owner of it from whom the defendant purchased it, and that by certain judicial proceedings which had been had subsequent to his purchase of the property it had been subjected to the payment of this debt, and for this purpose had been sold, and that the purchaser had recovered it of him, the plaintiff. These are not such allegations as amount to an assignment of a breach of the covenant of seizin and good title, whereby the covenantor would have been required in his defence to prove his seizin by sure and indefeasible title; and the case must be considered as the plaintiff has presented it. In this view of the case it appears that the plaintiff proposed to establish that one *St. Martin*, being in the possession of the land, was, at the time of his sale of it, indebted to the Commercial Bank of Natchez, and that this debt, or the judgment afterwards recovered on it, was a lien upon the property, and on this judgment an execution having issued the property was sold, and *John Henderson* having become the purchaser brought his action of ejectment, and having recovered, he, the plaintiff was compelled to purchase off the encumbrance from him. In this state of the case it is obvious that the plaintiff did not propose to question the validity of the title of *St. Martin*, he only proposed to show that his estate in the land was burthened with the debt, and in such a manner that the creditor had the right to subject it to sale for the purpose of having the money made, notwithstanding his sale to the defendant. The plaintiff endeavored to establish that it was sold as the property of *St. Martin*, the sheriff having conveyed the title of *St. Martin* to *Henderson*, and, on this title so acquired, the plaintiff insisted that *Henderson* had recovered in the action of ejectment. In this state of the case it is very plain that the defendant was not called upon to prove title in *St. Martin*; it was sufficient for him to deduce title from *St. Martin*. This he did by giving in evidence the deed of conveyance of *St. Martin* to himself. The burthen of the proof that *Henderson* had acquired a superior title from *St. Martin*, was thereby cast upon the plaintiff, and, unless he has established it, the issue on this supposed breach of these covenants of seizin and good title must be found for the defendant.

In order to deduce title from *St. Martin* to *Henderson*, and thereby prove the defendant had not title from him, the judgment of the bank against *St. Martin*, the execution and sheriff's return, and the deed of conveyance to *Henderson*, ought to have been all produced in evidence on this trial. On these documents, had they been given in evidence, the statute of Mississippi may have established a lien or priority which might have proved *Henderson's* the better title; but no such proofs were offered, nor any other which deserve to be even stated. But it is not necessary to pursue further this matter. The case does not appear in fact to have been prepared with a view to the recovery for a breach of either of these covenants.

The plaintiff mainly relied on the alleged breach of the covenant of warranty, and insisted that this has been broken by the judgment recovered against him in the action of ejectment by *Henderson*. If he prevail on this ground, he

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must show one or the other of these two facts: 1st. That the recovery was by title paramount to that which was conveyed him by the defendant; or, 2dly, That the defendant had notice of that action given to him, or his agent having the faculty of representing the defendant in the matter.

The first ground has already been disposed of, in the decision that it is not shown in this cause that *Henderson* had any title. It is not necessary to stop to prove that this is indispensable to a recovery, in the absence of notice of the former suit. The common law is unquestionable in this respect, and the deposition read by the plaintiff to prove what was the law in Mississippi, shows that the rule has not been altered in that State. The deponent says, a party evicted by a superior title of any sort from the possession of real estate which has been previously purchased with covenants of warranty, has a right to recover against his vendor, etc.

In respect to the second ground, we infer it to be the settled law in Mississippi that, if the defendant did defend the action by himself, or agent with sufficient authority to represent him in the matter, or if he had sufficient notice of the institution of the action, so that he might have defended the land by resisting its recovery, his covenant to warrant, or in other words to defend the land, was broken.

The question then is, did the defendant appear in the action of ejectment, or had he notice of its commencement in time to enable him to defend the land according to his covenant? It will not be necessary to separate these questions, for it will be found that if it appear that he had notice of the action it may be fairly inferred that he did appear by his authorized attorney and defend it, and if he did defend there is no occasion to make any enquiry in respect to the notice he had received of the institution of the action.

It is necessary, in the investigation of this matter, to recur to the evidence, and attend particularly to dates, and observe what existed and what does not appear to have occurred, at each stage of the history of the affair.

The defendant *Séjour* was a resident of New Orleans in 1841, and up to 1843, and it does not appear he ever resided elsewhere in the United States. On the 8th of April, 1841, he purchased this property on the bay of St. Louis of *Charles St. Martin*, at the price of \$6080—a debt owing him by *St. Martin*, and received his absolute deed of conveyance therefor, with covenants of seizin, good title and warranty, against all claim whatsoever, and having accordingly received possession he continued to hold it until his sale to the plaintiff. This possession was by his tenants, for it is admitted that he never resided at the bay of St. Louis. It does not appear that *Séjour* was in anywise disturbed in his possession, or had any reason to doubt the sufficiency of his title, or to apprehend that the property was subject to any encumbrance whatever.

On the 4th of February, 1843, *Séjour* sold and conveyed the property to the plaintiff, *Kling*. It was then a hotel, and, having been leased by *Séjour* to a tenant in possession, the sale was made subject to the term, which continued until the first day of the succeeding June. *Kling* was by the conveyance substituted to all the rights of *Séjour* as lessor, and obtained the seizin. On the 1st of May, 1843, just three months after his sale to the plaintiff, *Séjour* left the United States (for France, it is understood, for it appears he returned from France,) and did not return until 1847, which was after the judgment in ejectment had been recovered against *Kling*, and indeed after this suit had been commenced. There is no reason to suppose that *Séjour*, at that time, did apprehend that this property was subject to any encumbrance, or that there was

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any defect in the title, and therefore it cannot be presumed that he appointed any agent to receive notice from *Kling* of the institution of any suit against him in respect to the property. It is admitted that *R. S. Séjour*, a son of the defendant, attended to the collection of his rents, and it may be inferred that he had been appointed by the defendant for this office; but it cannot be inferred from this fact that the son had been appointed agent to receive notice of the institution of a suit against *Kling* for the recovery of property in respect to which it was not expected any controversy would arise, and there is no evidence that the son had any general commission to represent or personate his father in all things, and certainly such an universal commission cannot be inferred from the mere relation of father and son.

It does not appear that there was any ground to apprehend that any adverse claim existed or would be brought up against the property, until October, 1843. The sheriff, about this time, it is said, levied an execution upon it, and *R. S. Séjour*, the son, visited, from New Orleans it is understood, the bay of St. Louis, and employed counsel in conjunction with the counsel of *Kling* to assist in the defence of the suit, which it was expected would be instituted by whoever might become the purchaser of the property; and the counsel so employed did assist in the defence of the suit in consequence of this employment. Now, was this employment by the authority of the defendant? or, shall it be taken *prima facie* that it was by his authority, so that the defendant must prove the negative? It has already appeared that it cannot be presumed that the defendant had left with his son a commission to represent him in any such unexpected affair, and there is no evidence whatever of any notice or information given him of any such seizure or sale, or action of ejectment by the purchaser. The plaintiff called upon the defendant to produce and file the letters it was alleged he had written to the defendant, giving such notice. Defendant answered on oath in open court that he had never received any such letters, and had no knowledge of his son's having received any, and the plaintiff offered no proof of any such. Our own views on this subject have been recently given in the case of *Fuselier v. Robin*, ante p. 61.

It only remains to ascertain whether the appearing in court of the lawyer who was employed by the son made the father a party to the proceedings, or in any otherwise has the effect of rendering the judgment which was recovered either *conclusive*, or *prima facie*, evidence against the defendant, that the recovery was had on superior title.

The employment of *Mr. Lampkin*, by the son of *Séjour*, as the assistant of the counsel of *Kling*, the defendant to the action, did not make *Séjour* a party on the record. *Kling* only was admitted defendant to the suit in the place of the casual ejector. If *Séjour* had been also admitted defendant then he would have been a party, and the question would have occurred whether the judgment would have been effectual against *L. Séjour*—whether the attorney had authority to represent him in court or not. There are cases in which it has been determined that the judgment in such cases does constitute *res judicata*, and that the party so represented cannot show that the attorney had no authority, but those are cases in which the persons resisting the effect of such proceedings were made a party on the record. This is not such a case. *Séjour*, the father, was not made a party, there was no judgment against him, and the effect of the counsel employed by the son appearing in the cause and arguing it, depends entirely upon the authority by which he appeared. It is impossible to hold the defendant bound by either the notice of the action of ejectment to him

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son, or his employment of the counsel to represent defendant, without assuming and establishing the broad proposition that any son may act for his father in any matter whatsoever in his absence, which may unexpectedly arise; and, unless the authority of the son is so established, the authority of the attorney cannot be maintained, without establishing the proposition that any attorney may appear in any cause without our authority and without making us even a party on the record, and bind us by all the proceedings had in the cause.

There is nothing then in the fact that *Mr. Lampkin* did appear in the defence of the action of ejectment; the defendant was not *Séjour* the defendant in the present action, but *Kling* the plaintiff here, and according to the record he appeared for *Kling* only. It is established that he appeared on the employment of *R. L. Séjour* and was paid by him, but there is no evidence that *R. L. Séjour* employed him in the name of his father, *L. Séjour*, and much less that he had any authority so to employ him; and, in the absence of all proof that *L. Séjour* had notice of such a suit, or even an apprehension that such a one, or any other in respect to the land, would ever be instituted, it cannot be presumed he had authority.

Thus far we have spoken of the supposed notice to *L. Séjour*, without inquiring what notice would have been sufficient, and have treated the matter as if any information that such a suit existed would have been sufficient. But we understand the law of Mississippi to require much more to bind a party by a judgment.

It is true there is enough in the circumstances of the case to raise a plausible conjecture that the defendant had this notice, and that the employment of the counsel was by his authority, but conjecture is far from being sufficient in such a matter. The notice, it must be observed, if given, is in the nature of a judicial process, and has the effect, if established, to constitute the judgment *res judicata*, and would preclude the defendant in this action from controverting that the plaintiff in that had good title, and surely no such effect could be given to a judgment against one who is no party to the record by any such conjecture. It is not necessary to show that in common law proceedings the service on the person in such cases is required, or that it must be by some means shown that the notice came to the party. Those courts never act on such conjectures as would be necessary to be resorted to in this case for the purpose of binding a party by a judgment: and the notice to have effect in this suit must be such as the laws of Mississippi for such purposes required, and not such as we might require had the land and suit been in this State.

There is no competent evidence that the defendant in this suit had any notice whatever of the action of ejectment—no proof that it was defended by his authority; and there being no evidence that the judgment was recovered by a superior title, or that the plaintiff in that action had any title to the property, the plaintiff cannot recover in this action.

It is to be observed that, we have considered the rights of the parties in this suit as existing under a jurisprudence foreign to our own.

The provision of the Code, arts. 2493, 2494, which binds the vendor by a judgment of eviction against the purchaser even in the absence of a notification of the suit, unless the vendor shows that he possessed proofs which would have maintained his title, and which, for want of notification of the suit to him, have not been made available, has no application to this case. The judgment referred to is a judgment in a petitory action, which is conclusive as to the rights of the parties. An action of ejectment is for the recovery of land, but a judg-

ment in it is not conclusive as to the right. The action may be renewed by either party, or the right may be again tested in an action of another form. At all events, any inquiry as to the application of our laws to this case would be entirely superfluous.

It only remains for us to state that the cause of the delay in the preparation of this opinion and also of its unusual length, is to be found in the fact that the case has been submitted to us *ex parte*, without any argument or note on behalf of the defendants, notwithstanding the elaborate briefs presented by the counsel for the plaintiff, in addition to the full argument at bar. We have been compelled to examine all the points which the case presents, instead of confining ourselves to those to which an argument on the part of the defendant might have limited us.

The judgment of the District Court is, therefore, annulled, and judgment rendered against the plaintiff as in case of non-suit, with costs in the District Court; the defendant paying the costs of this appeal.

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### Fox v. Fox et al.

A judgment against the original debtor is *prima facie* evidence of the debt, against the holder of property sued in a revocatory action to set aside a sale of the property on the ground of simulation. The holder may controvert it by all legal means, but the burthen of proof is on him. C. C. 1967, 1971.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preston*, for the plaintiff. *Roselius*, for the appellants. The judgment of the court was pronounced by

ROST, J. This is a revocatory action, in which the plaintiff seeks to set aside a sale of property on the ground of simulation. The case was tried before a jury who returned a verdict in favor of the plaintiff, and the defendants have appealed from the judgment rendered thereon.

The only serious question presented for our consideration by the appellants is, whether the claim of the plaintiff against the original debtor has been sufficiently proved. Their counsel contends that the judgment against *Fox*, on which the plaintiff relies, is not evidence against the real defendant in the action, because he was not a party to it.

The law-giver would have been guilty of a strange inconsistency, if, after providing that a creditor might prosecute a revocatory action, without making his debtor a party to the proceeding, provided the claim was liquidated by a judgment, he had further ordained that this judgment should have no effect whatever in the prosecution of the action. We cannot adopt that interpretation. The judgment is *prima facie* evidence of the debt against the holders of the property claimed. They may controvert it by all legal means, but the burthen of the proof is on them. C. C. 1967, 1971.

No evidence has been adduced by the defendants in this case to disprove the plaintiff's claim; and, as we are satisfied that the jury has done justice between the parties, the judgment must be affirmed. *Judgment affirmed.*

KLING  
v.  
SBJOUR.



## ANDERSON v. DACOSTA.

The clause of art. 3508 C. C. which provides that "if the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale," does not apply to vices of character.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Pilot*, for the plaintiff, *Train*, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiff has instituted this action to rescind the sale of a female slave, on the ground that she was in the habit of running away previously to the sale. The defendant pleaded a general denial, and called his vendor, *Faire*, in warranty. A judgment was rendered in favor of the plaintiff against the defendant, and in favor of the latter against his vendor *Faire*. *Faire* has appealed.

The district judge assigned the following reasons for his judgment: "It is proved that the slave *Matilda*, whilst in the possession of the warrantor *Faire*, absented herself from *Smith*, with whom she was hired, from the 2d to the 5th of July, and was brought back by her master, who declared she had run-away before. It is further in proof that she was taken up and lodged in prison on the 28th of September, being within three days after her sale to the plaintiff. This, under arts. 2505 and 2508 C. C., establishes the law."

The facts stated by the judge are fully established by the testimony of three witnesses, whom he believed, and no fact proved by the appellant stands in necessary conflict with the truth of their statements. But it is contended that art. 2508 of the Code has no application to vices of character, and that the judge erred in considering the fact that the slave absented herself within three days after the sale as affording a presumption of the previous existence of the habit of running away. This position is supported by the authorities to which we have been referred. 6 La. 40. 5 Mart. 372.

The conduct of the slave, subsequently to the sale, may be considered in connection with other testimony in determining the previous habit; but, when the alleged vice is one of character, does not create the legal presumption spoken of in the article referred to. In the present instance, however, the testimony showing the existence of the habit anterior to the sale is sufficient to support the decision of the district judge, without the aid of that presumption.

*Judgment affirmed.*

## SOLOMON v. CAVELIER.

Where one who claims to be the owner of a slave found in the possession of a third person, causes him to be placed in jail, and commences a petitory action to recover him, an action for damages for the illegal imprisonment will be prescribed by one year from the termination of the imprisonment. The prescription is not suspended by the pending of the petitory action. The rule *Contra non valentem &c.* is inapplicable to such a case, as the damages might have been claimed in reconvention, being connected with and incidental to the action for the recovery of the slave. C. P. 375.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. W. H. Hunt*, for the plaintiff. *Blache*, for the appellant. The judgment of the court was pronounced by

SOLOMON  
v.  
CAVELIER.

**KING, J.** The plaintiff, as the assignee of *Moss*, instituted this action to recover the value of the services of a slave, who, it is alleged, was wrongfully confined by the order of the defendant in one of the public prisons of this city. The defendant denied his liability and pleaded the prescription of one year. A judgment was rendered in favor of the plaintiff, and the defendant has appealed.

It appears that *Cavelier* and *Davenport* claimed to be the owners of the slave in question, and finding him in the possession of *Moss*' agent, directed him to be lodged in prison, where he was accordingly placed, in January, 1845, and remained for nearly a year. They also instituted a petitory action against *Moss* for the recovery of the slave, in which they prevailed in the lower court, but, upon an appeal, the judgment of the inferior tribunal was reversed, in May, 1847, and *Moss* decreed to be the owner. See 2 An. 584. The present suit for damages, was not instituted until the 25th November, 1847, nearly two years after the commission of the wrongful act complained of. The action was consequently prescribed, unless prescription was interrupted or suspended. C. C. arts. 3501, 3502.

The district judge was of opinion that the prescription was suspended by the pendency of the petitory action between the same parties, on the principle, *Contra non valentem agere non currit prescriptio*. He considered that *Moss* was not bound in the first suit to plead in reconvention the damages claimed in the present action, and that he could not have instituted a separate suit to recover them. The district judge, in our opinion, erred. That *Moss* could have instituted his demand in reconvention for the damages now claimed, we think admits of no doubt. The demand was connected with and incidental to the main action. C. P. art. 375. That the extent of his damages was not then known, formed no valid objection to instituting his reconventional demand. His claim could have been set forth for the monthly value of the slave's services, precisely as it has been averred in the present action. Whether he could have instituted a separate suit for damages, while the first was pending, it is immaterial to inquire. He had an adequate remedy, of which he failed to avail himself, and cannot now assert that he was unable to act, and claim the benefit of the rule *Contra non valentem agere*.

The judgment of the District Court is, therefore, reversed, and a judgment rendered in favor of the defendant, with the costs of both courts.

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#### ARMANT v. HER HUSBAND.

4 187  
107 529

Blows inflicted on a wife by her husband, will entitle her to a separation from bed and board.

**A**PPEAL from the Fourth District Court of New Orleans. *Strawbridge, J.* Judgment of separation was rendered by the lower court in this case, on proof of blows inflicted on the wife, by the husband. *Soulé*, for the plaintiff. *Roselius* and *Grymes*, for the appellant. The judgment of the court was pronounced by

**KING, J.** This is an action for a separation from bed and board, in which

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v.  
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the plaintiff prevailed in the lower court. We have given to the case the most serious consideration, and are of opinion that the judgment appealed from should be affirmed for the reasons assigned by the district judge, which, to our minds, are conclusive, and which we adopt. See also 2 Toullier, no. 764. Pothier, Cont. de Mariage, nos. 508, 509.

*Judgment affirmed.*

4 138  
116 48

### COMMISSIONERS OF THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS v. YORKE et al.

A decision of a court of the first instance on an incidental question, not presented by the pleadings, will not be examined on appeal, unless the evidence on which the court acted is stated in a bill of exceptions, or referred to as making a part of it.

The effect of the answers of a garnishee is to throw the burthen of disproving them on the other party.

When an agent makes a purchase for himself which he was bound to make for his principal, the latter may, if he choose, take the purchase, and the agent will be bound to account to him for it; but this principle cannot prevent an agent from purchasing a judgment against his principal, though to the detriment of the creditors of the latter.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Carter and Bradford*, for the appellant. *L. Peirce and Micou*, contra. The judgment of the court was pronounced by

EUSTIS, C. J. Those cases have already been before us on appeals taken by *Henry Florance*; they were remanded for further proceedings, in December, 1847, and January, 1848, and will be found reported in 2d and 3d Annual, pp. 995, 155. In the District Court the cases were consolidated and tried together. Judgment was rendered against *Florance*, by which his traverse to the answer of *Hanna*, garnishee, as well as his third opposition, in which he claimed priority of payment out of a certain fund in the hands of the sheriff of the parish of Orleans, were both dismissed at his costs. *Florance* has again appealed. Several bills of exception have been taken to the decisions of the district judge on points raised on the trial of the cause.

The first is to the order of the District Court consolidating these causes. When they were before us on the first appeal they were in such a condition that the ordinary rules of proceeding could not be applied to them, and their consolidation was one step towards restoring them to that order which is necessary to their proper termination. The bill of exceptions to this proceeding is without any ground whatever.

A second bill of exceptions was taken to the decision of the district judge refusing the appellant a continuance. It appears that, on the 13th November, 1848, the day before the cause was fixed for trial, on the motion of the counsel of *Florance*, it was ordered that *Hanna* produce in court, on the trial, the letters received by him from the defendant *Yorke*, and his correspondence with *Yorke* referred to in his answers to the interrogatories propounded to him as garnishee. The return of the sheriff showed that *Hanna* was absent from the city, and there was consequently no service of the rule; and *Florance* thereupon applied for a continuance.

The district judge refused the continuance because the only correspondence which had taken place between *Yorke* and *Hanna*, according to the answers of

the letter to interrogatories, was a letter from the latter to the former informing him of the purchase of certain judgments, which it did not appear was in *Hanna's* possession. The judge did not think that the party in his call for papers, had complied with article 473 of the Code of Practice, which provides that the order of court to produce papers or documents on the trial of a cause must describe such papers or documents. In this opinion of the district judge we concur.

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It has been contended in argument that the district judge ought to have granted the appellant a continuance on account of the absence of a witness, on the affidavit of the party as to his materiality, &c. It is conceded that the continuance was applied and refused, but no bill of exceptions was taken to the decision of the court. We concur with the counsel for the appellee, as to the rule of practice which prevails in this court. We can only review the opinion of the judge when we have his decision before us with the grounds on which it is based, except where the question decided is presented by the pleadings. We have never examined the decision of a court of the first instance on any incidental question raised, without having the evidence on which the court acted stated in a bill of exceptions or referred to as making part of it. Such we take to be the only safe rule in reviewing such decisions in an appellate court.

A bill of exceptions was also taken to the admission in evidence of the answers of the garnishee *Hanna*, which had been traversed, and on which issue was thereby made. As the whole case is before us, we shall only consider the effect of those answers in the garnishment, that is as to the matters set up in the answers of the garnishee. The effect of these answers was to throw the burthen of disproving them on the appellant, which he has, in our opinion, failed in doing. It, therefore, remains to be considered, what the appellant's right is, on the evidence as presented on his third opposition to the distribution of the funds in the hands of the sheriff of the parish of Orleans.

*Hanna*, it appears, had purchased a judgment against *Yorke*. *Florance* also bought one, which was recorded subsequently to that purchased by *Hanna*. On execution on *Hanna's* judgment a certain sum was made, which is now in the hands of the sheriff. *Florance* filed his third opposition claiming precedence on this sum by virtue of his judgment and execution which had been issued on the ground that *Hanna* had bought the judgment for the benefit of *Yorke* the debtor, and that it is consequently satisfied in law, and that the proceeds of the property sold fell to him as holding the next judgment and execution. *Hanna* filed a general denial to this opposition, and on this issue evidence on both sides was adduced.

We think it proved by the testimony of one of *Florance's* own witnesses that the judgments purchased by *Hanna* at the sale of the effects of the Exchange and Banking Company, were bought by him with means obtained on his own credit exclusively, and that by the purchase the judgments became his and not *Yorke's*, and were consequently not extinguished thereby.

*Yorke* was an absconding debtor, and had left with *Hanna*, who was his brother-in-law, a general power of attorney. He had attempted to compromise with *Yorke's* creditors, and had remitted money received on his account to him for his support. It is contended by the counsel for the appellant that, holding this power of attorney, he, the agent, could not buy a judgment against his principal to the detriment of *Yorke's* creditors. We do not understand the doctrine on which this argument is produced to be extended beyond the well recognized principle that, when an agent makes a purchase for himself, which

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he was bound to make for his principal, it rests with the principal, if he chooses, to take the purchase, and the agent is bound to account to him for it. It was optional with *Yorke* to take this purchase made by *Hanna*, if the agency continued at the time of making it; but he was undoubtedly bound to re-emburse *Hanna* the price which he paid for it. But the object of *Florance* is to make the money made under execution directly available to his execution as the property of *Yorke*, the defendant, subject to seizure. Whatever suspicions there are about these transactions, and there is certainly much ground for them, the evidence does not authorize us in subjecting this fund to the execution of the appellant. There is nothing shown to have transpired on the part of *Yorke* indicating his intention or wish to have the benefit of the judgments, nor on the part of *Hanna* to hold them for his benefit. On the issue made between these parties, we see no reason for reversing the judgment of the District Court.

*Judgment affirmed.*

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RIDDELL v. GORMLEY.

Though a defendant have omitted to plead in compensation in an action against him a debt due to him by plaintiff, he may, on the ground that compensation takes place by mere operation of law, oppose the compensation to any attempt to execute the judgment; and this though, at the time of instituting the suit against him, or of executing it, the claim offered in compensation would otherwise be prescribed, provided that the prescription had not been completed at the time when the debt due by him was payable.

**A**PPEAL from the Second District Court of New Orleans, *McHenry*, J. presiding. *Bartlette*, for the appellant. *Preston*, for the defendant. The judgment of the court was pronounced by

*Rost*, J. The plaintiff is the legal representative of *Schrager's* estate, against which the defendant obtained a judgment on the 27th of October, 1836, on some property notes, endorsed by the said *Schrager*, and bearing date 20th February, 1832. *Schrager* died in December, 1832, and at the sale of his succession, *William Gormley*, whom the defendant now represents, became the purchaser of horses and other moveable effects, to the amount of \$273 25, which he refused to pay at the time, saying that he held the above mentioned notes, on which *Schrager* was responsible. The defendant having obtained an execution on her judgment, in October, 1847, the plaintiff paid the amount of it, except the aforesaid sum of \$273 25, to the amount of which he enjoined the proceedings. The district judge was of opinion that the claim of the plaintiff in injunction was barred by the prescription of ten years, and plaintiff appealed.

There having been mutual indebtedness between *Schrager's* estate and *Gormley*, and their respective claims being equally liquidated, the debts, up to the amount due by *Gormley*, were extinguished by compensation before either was prescribed, and that compensation may now be pleaded by the plaintiff. 7 *Toullier*, no. 388, 389.

The defendant has also pleaded payment, but has failed to establish it in a satisfactory manner. It was not enough for her to render the fact of payment

probable; but we are of opinion she has failed even in this. The plaintiff is entitled to a judgment.

It is, therefore, ordered that the judgment in this case be reversed, and that the injunction be perpetuated, with costs in both courts.

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BREAUX et al. v. JOHNS et al.

On the discovery of the American continent the principle was asserted or acknowledged by all European nations that discovery, followed by actual possession, gave title to the soil to the government by whose subjects, or by whose authority, it was made, not only against other European governments, but against the natives themselves. While the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves.

Indian tribes in Louisiana, to whom lands were allotted by the laws of Spain, were never invested, by those laws, with the absolute ownership. The Indians were not permitted to dispose of those lands without being expressly authorized by the government. If all died or removed permanently, the lands reverted to the crown, not by forfeiture, but by the implied right of reversion; or, if the population of the Indian villages was greatly reduced in number, the remnants of several villages were united into one, and, in such case, they continued to hold so much of the land originally set apart for them as they stood in need of.

The ultimate right to the soil occupied by Indian tribes in Louisiana is in the United States, who can grant the soil while yet in the possession of the natives. Such grants convey title to the grantees, subject to the Indian right of occupancy.

A PPEAL from the District Court of Iberville, *Penn. J. Labauve*, for the appellants. *W. E. Edwards*, for the defendants and warrantors. The judgment of the court was pronounced by

ROST, J. This is a suit for slander of title, in which the defendants have justified the slanders alleged, and plead title in themselves. The plaintiffs claim under a patent issued on a certificate of purchase from the United States, as authorized by the preemption law of 1834. The defendants allege that they possess under the primitive owners of the soil, the Chetimacha tribe of Indians, by virtue of a lease and transfer, made in 1807 to their ancestor, *Nathaniel Cropper*, by the said Indians, for and during the term of ninety-nine years. They have called in warranty the Chetimachas, who have been made to appear in their national capacity, and to answer as follows: That the title to the land in controversy is in themselves, having been the owners and possessors thereof as far back as tradition, authentic history, or the memory of man runneth, and holding it by descent through many generations of their ancestors; that their nation were owners and possessors of said land, when the french nation first discovered it, and proclaimed its sovereignty over the territory of Louisiana; that the french and spanish governments recognized their title to the land, and by the treaties of Paris and San Ildefonso bound the United States government to do the same; that the United States government, in a compact with the territory of Louisiana, at the time of her admission into the Union, acknowledged the title of the warrantors to the land in controversy, and therefore the general government could not survey or alienate said land, without their consent. This defence was sustained in the court below, and plaintiffs appealed.

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"In 1699, Iberville landed at Biloxi, crossed over to and passed up the Mississippi, which he explored, discovering the forks of the Chetimachas (now bayou Lafourche) and bayou Plaquemine. The country was then in possession of the Chetimacha tribe of Indians, from the bayou Plaquemine to the bayou Lafourche, as far as it can be ascertained." Martin's History of La. vol. 1, pp. 142-144. This historical fact is corroborated by the testimony of many old inhabitants of the country. It is proved that this tribe had two places of residence, one on bayou Jacob, near the Mississippi river, and the other on the bayou Plaquemine, adjoining the land in controversy, and that they occasionally removed from one place to the other. It is also shown that they had another village on bayou Têche; that their claims to the lands on bayou Jacob and bayou Têche have been confirmed by the United States, and that the application made to the board of commissioners, in 1807, for the confirmation of one thousand two hundred and three superficial arpents opposite the mouth of bayou Grosse Tête, and including the land in controversy, was rejected.

The plaintiffs rely upon the case of *Martin v. Johnson et al.*, 5 Martin's Rep. 655; and also upon the case of *Reboul v. Nero*, 5 Ibid., 490, which turned upon the title of this same tribe of Indians to the village on bayou Jacob. It was held by our predecessors, in those cases, that the lands assigned to Indian tribes by the spanish government were granted in full ownership, and that the government surveyors were bound to notice their location, and could not survey them as vacant. We are not prepared to give an unqualified assent to those propositions.

Upon the discovery of the American continent, the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the government by whose subjects or by whose authority it was made, not only against other European governments, but against the natives themselves. While the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to be in themselves. *Johnson v. McIntosh*, 8 Wheaton, 543. *Worcester v. State of Georgia*, 6 Peters, 515. *Fletcher v. Peck*, 6 Cranch, 87.

Spain, besides claiming as other nations by right of discovery, rested her title to the soil upon the higher sanction of apostolic dispensation. In the exercise of a power then held to be divine, the Pope, Alexander VI, granted to Ferdinand and Isabella, all the lands discovered, or to be discovered, by their subjects on this continent, and the islands adjoining it. This grant is found in *extenso* in Solorzano, Politica Indiana, b. 1, ch. 10, nos. 23, 24. There can be no doubt from the words used, nor has it ever been doubted by the courts or government of Spain, that it was absolute, and vested in the sovereign, all the lands discovered or to be discovered, whether or not they were appropriated or occupied by the natives at the time of discovery. "The king," say Solorzano, "was unico y absoluto dueño, de tierras, montes y pastos."

We must, therefore, ascertain whether the laws of Spain, after the discovery of America, restored the natives to the absolute ownership of the lands allotted to them, there being no doubt that those laws were enforced in Louisiana.

Isabella states in her will that, when she and her husband Ferdinand applied to the Pope for the grant already mentioned, their main object was to civilize the natives, and to convert them to christianity. In furtherance of those objects, it was ordained by the law 1st. tit. 3d, book 6th of the Recopilacion de leyes de Indias, that the Indians should be compelled to dwell in villages,

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where they may more conveniently be instructed in the catholic faith, and the arts of civilized life. This law was carried into effect, and the nature of the title of the Indians to the lands allotted to them may be deduced from the other laws in the same book and title, and their commentary in the *Politica Indiana*. They could not dispose of those lands without an express authorization from government. If they all died, or removed permanently from the village, it reverted to the crown, not by forfeiture, but by the implied right of reversion. The villages and *reducciones* could be altered, and their location changed, with the authorization of the king, of the vice-king, or of the audiencia. *Politica Indiana*, book 2, ch. 24, nos. 42, 45. When the population of the villages had greatly diminished in numbers, the remnants of several villages were concentrated into one, and in that case they continued to hold only so much of the land originally set apart for them as they stood in need of.

In the case of *Martin v. Johnson et al.*, it was in evidence that the Pascagoula and Biloxi tribes of Indians had thus been removed to bayou Boeuf, and located on the *reduccion* of the Choctaws, with the consent of that tribe.

These regulations were substantially the same as were enforced by England in North America, and have been enforced by the United States since the revolution. In Louisiana, as in the other States, the nature of the Indian title was not such as to be repugnant to the right of ultimate dominion in the sovereign of the country. In the case of *Martin v. Johnson et al.*, the court was of opinion that under the 27th law, title 1, book 6, of the laws of the Indies, Indians could hold land as well as other people. That law only says that Indians can sell their lands when properly authorized to do so, and it provides that the sale must in all cases, under pain of nullity, be made at public auction, after thirty days advertisement. It appears to us that, by this sale, the Indians transferred their right of occupancy, and that the authorization of the government to sell was in the nature of a grant, and vested the title in the purchaser.

In the case of *Mitchell et al. v. The United States*, 11 Peters, 711, the Indian titles, under which the plaintiffs claimed, rested upon solemn treaties, entered into between Spain and the powerful tribes of Indians which then occupied the province of Florida. These treaties were in derogation of the laws of the Indies, and probably did vest the absolute title in the Indian tribes. But no such treaties were ever made with the tribes which inhabited Louisiana, and that case is not applicable to the one under consideration.

We believe the ultimate right to the soil occupied by the Indians to be in the United States, and that, as a consequence of this ultimate dominion, they have the power to grant that soil, while yet in possession of the natives. These grants convey a title to the grantees, subject only to the Indian right of occupancy. *Fletcher v. Peck*.

Applying these principles and laws to the present case, we find that the Chetimacha tribe of Indians had three villages, two of which have been recognized by the United States as properly located, and the claim to the other rejected.

The evidence in the record goes to show that the rejected claim was a *reduccion* regularly made under the laws of the Indies is not satisfactory, nor does it seem to be in accordance with those laws that two such grants should have been made to the same tribe, within seven or eight miles of each other. But supposing the claim to be valid, the United States could grant the land it covers, subject to the right of occupancy of the Indians, and as they have

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censed to occupy the portion in controversy, since 1807, the plaintiffs are entitled to take possession of it, under their patent.

The defendants themselves appear to have considered the Indian title in that light, as they have claimed the right of preëmption by virtue of settlement and cultivation, and have purchased through error a lot within which they supposed the land in controversy to be situated.

The attempt of the defendants to recover from the Indians as warrantors, is preposterous. They, as well as those under whom they claim, well knew that the title under which they possess was an absolute nullity, from which no legal effects could result.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs; that the said plaintiffs be forever quieted in their possession and title to the lot described in their petition, against all claims or pretensions of the defendants. It is further ordered, that the claim of the defendants in warranty be dismissed, and that said defendants pay the costs in both courts.

COX v. MYERS.

Slaves are not subject to provisional seizure to secure the rent of the premises on which they are found, though the tenant have no other property. The right of the lessor to a provisional seizure can be exercised only on moveable effects found on the premises. C. C. 2675.

Where a slave found on leased premises is illegally taken by the landlord under a writ of provisional seizure, and he dies of a disease contracted during his imprisonment under the seizure, the plaintiff will be responsible for his value. C. P. 295. C. C. 2291, 2294.

APPPEAL from the District Court of Madison, *Selby, J. Thomas and Snyder*, for the appellant. *Amonett*, for the defendant. The judgment of the court was pronounced by

ROSE, J. This suit was instituted to recover of the defendant a sum of money, due in part for rent of land. The plaintiff claimed the lessor's privilege, and obtained a provisional seizure, under which a slave, belonging to the defendant and found on the leased premises, was seized, and confined in the common jail, where he contracted a disease of which he died. The defendant answered by a general denial and a plea in reconvention, claiming \$204 as due upon an account, and \$1,000 the alleged value of the slave, the latter claim being made on the ground that the seizure was illegal. There was judgment in favor of the defendant in reconvention for \$445, with five per cent interest and the plaintiff appealed.

The court below appears to have considered the plaintiff's claim as proved, but held him liable for the value of the slave. We concur in this view of the law. For that portion only of the plaintiff's claim, which was for rent, he was entitled to a provisional seizure. But it is clear that slaves are not subject to provisional seizure to secure the rent of the premises on which they are found, even when the tenant has no other property. This right of the lessor can only be exercised on the moveable effects found on the leased premises. C. C. 2675.

If slaves could be provisionally seized for the arrears of rent of the land on

which they are found, it would follow that they might be sold under the lessor's privilege, and thus pass into the hands of the purchaser free from any mortgages which might previously have existed upon them. A construction that would lead to such a result cannot be the proper one. The seizure of the slave in this case was an illegal act. C. P. 295. C. C. 2291, 2294. *Boyce v. Poydras de Lalande*, 6 La. 277.

Cox
v.
Myers.

The plaintiff's counsel further contends that a plaintiff is not responsible for any damage which may result from the exercise of a legal right, unless he is prompted by malice, and then only when his pursuit is wanting in probable cause.

This is true, but the plaintiff in this case was not exercising a legal right, when he caused the slave to be seized. After that seizure he was in fault, and as it is proved that the slave died of a disease contracted during his confinement in a damp and unhealthy jail, the defendant must be compensated for his value. The amount allowed is fully sustained by the evidence.

Judgment affirmed.

WOOD et al. v. LYLE.

An application for a jury is too late, after the case has been fixed for trial.

Improvements made upon the public lands of the United States, where the party making them is not in a situation to avail himself of the preemption laws, cannot form the object of a contract. Arts. 1885, 1886, of the Civil Code limit the rule contained in art. 1960, that no one ought to be permitted to enrich himself at the expense of another, to cases in which the alleged benefit arises from a lawful act. From unlawful acts, though they may have proved beneficial to others, no right not expressly authorized by law can arise.

APPPEAL from the District Court of Madison, *Selby, J. Thomas and Snyder*, for the appellants. No counsel appeared for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiffs sue to recover a tract of land in the possession of, and cultivated by the defendant. The answer admits the title of the plaintiffs, but avers that the defendant has placed valuable improvements upon the land, for the value of which he is entitled to be reimbursed before the judgment of eviction can be executed against him. There was judgment in favor of the plaintiffs for the land, and against them for the sum of \$234, the value of the improvements placed thereon by the defendant. The plaintiffs have appealed.

The defendant filed an amended answer, praying for an order of survey and a trial by jury, after the cause had been set down for trial. These applications were rejected, and the defendant took a bill of exceptions to the opinion of the judge. The survey was unnecessary, as the plaintiffs were willing to take a survey previously made for the defendant, by a surveyor of his own choice. After the case had been set down for trial, and while it stood in that situation, the defendant could no longer claim a trial by jury.

It is in evidence that the land in controversy had been offered for sale, and was subject to entry. It is also shown that this land was enclosed between

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other tracts belonging to the defendant. Under the rule established in the case of *Jenkins v. Gibson*, 3 An. 203, the defendant was a trespasser, and is not entitled to indemnity for his improvements. The land is proved to be of inferior quality subject to overflow, and but imperfectly cleared. Whatever labor has been expended upon it by the defendant inures to the benefit of the plaintiffs, and we do not consider that the evidence would justify us in allowing the rents claimed.

It is, therefore, ordered that the judgment in this case be amended, so as to disallow the defendant's claim for the value of the improvements put by him upon the land; and that, as amended, it be affirmed, with costs.

GLASSCOCK, Tutor v. GREEN.

The husband, as head of the community, is bound to pay its debts. If he uses the separate funds of his wife for that purpose, he becomes her debtor for the amount.

APPEAL from the District court of Concordia, *Barry, J. Stacy and Sparrow*, for the appellant. *Thomas and Snyder*, for the defendant. The judgment of the court was pronounced by

KING, J. The plaintiff has instituted this action against the defendant, the mother and former tutrix of *J. W. D. Glasscock*, to render an account of her tutorship. In obedience to an order of court the defendant filed an account, exhibiting a balance in her favor, for which she prayed judgment. She subsequently, in an amended answer, claimed an additional credit for the proceeds of a crop of cotton, made previous to her marriage with *Glasscock*, the father of the minor, which were received by him during the marriage. The account was opposed by the tutor on various grounds. The district judge rendered a decree establishing a sum to be due to the defendant by the minor, and the plaintiff has appealed.

The appellant complains: 1st. That a sufficient amount has not been allowed for the hire of certain slaves, the individual property of the minor. 2d. That an error of \$63, has been made in the addition of the debit side of the account presented by the tutrix, to the prejudice of the minor. 3d. That interest has not been allowed on the one half of the value of the moveables and improvements belonging to the community, for which the tutrix has been held liable. 4th. That the judge erred in allowing the defendant a credit for the crop of cotton of 1839.

I. The defendant debited herself, in her account, with the hire of the minor's slaves, from the death of her husband to the 13th March, 1839. It appears however, from the evidence, that the slaves were not delivered to the plaintiff until the 6th January, 1840. The hire for nine months and twenty-four days, at the rate fixed by the district judge, must be placed to the minor's credit.

II. The error of \$63 in the additions, must likewise be corrected.

III. We have repeatedly held that tutors are liable for interest on the funds of their wards which they fail to invest. But, in the present instance, the defendant appears to have been a creditor of the succession which devolved upon

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the minor, at the time that it was opened, for an amount nearly equal to the value of the moveables and improvements for which she has been held liable; and, shortly after *Glasscock's* death, became a creditor for an amount exceeding this liability, by the payment of community debts. She can consequently owe no interest.

IV. The evidence, in our opinion, satisfactorily shows that, the defendant made a crop of one hundred and twenty-six bales of cotton during the year 1830, prior to her marriage with *Glasscock*, which did not occur until the 15th December of that year; and that the proceeds, i. e. \$3497 35, were received by her husband subsequently to the marriage. A part of the sum it is true, was applied to the payment of debts contracted by the defendant anterior to the marriage, but the amount thus appropriated was deducted by the judge from the sum for which the minor has been held answerable.

It is shown that the proceeds of this crop were in part applied to the purchase of plantation supplies, and other articles for the use of the community between *Glasscock* and the defendant. The plaintiff contends that the succession of *Glasscock* should not be held to account for these expenditures. To this it is satisfactorily answered that *Glasscock* was the head of the community, and bound to pay its debts. If he used the separate funds of his wife for that purpose, he became her debtor for the amount thus applied.

The judgment of the District Court is, therefore, amended, by allowing the plaintiff a credit for \$63, and for the hire of the minor's slaves for nine months and twenty-four days. Thus amended, the judgment appealed from is affirmed; the appellee paying the costs of this appeal.

COBB et al. v. PARHAM et al.

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49 584

Decision in *Jure v. First Municipality*, 2 An. R. 321, affirmed.

APPEAL from the District Court of Madison, *Selby, J. Bemiss, Prentiss* and *Gaither*, for the appellants. *Thomas*, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. Under the circumstances of this case, which have been stated in the decision of the cause upon the merits, we are of opinion that the conditional order of dissolution of the injunction was properly rendered.* See C. P. 307. A suspensive appeal should not have been allowed. See the case of *Jure v. First Municipality*, 2 An. 321.

Appeal dismissed.

*The order of dissolution was on the condition of defendant's executing an obligation, with surety, in favor of the plaintiff, as required by art. 307 C. P. R.

COBB et al v. PARHAM et al.

An award rendered by amicable compounders cannot be revised by the court for errors of judgment; it can only be attacked for fraud or usurpation of power on the part of the auditors.

An award of arbitrators, not binding on account of the want of authority from a married woman to her husband, who had agreed, in the name of the former, to an extension of the time for making the award, and in consequence of its not having been duly homologated, will be rendered valid by a subsequent execution of it by the parties. Its execution by the wife would cure the want of original authority in the husband, and the execution of the award by the parties would entitle them to its benefits, as fully as though it had been duly homologated.

To confirm an act not binding on a party a formal instrument is not indispensable. Its voluntary execution involves a renunciation of the exceptions which might have been opposed to it.

A partial execution demonstrates, as well as an entire execution, the wish to confirm a defective act. It is a tacit approval.

APPEAL from the District Court of Madison, *Selby, J. Bemiss, Prentiss A and Gaither*, for the appellants. *Thomas*, for the defendants. The judgment of the court was pronounced by

SINDELL, J. The transactions out of which the present suit has grown, began under relations of intimacy and good will, which were followed by mutual complaints and controversy. After an acrimonious litigation, the parties seem to have reflected for a time upon its injurious consequences to themselves and to their creditors, and to have made an agreement to submit the matters in dispute to arbitrators, whom they clothed with the authority of amicable compounders. The controversy involved a large estate called the "Buckhorn plantation," of which *Mrs. Cobb* and *Lowry*, were the joint proprietors, and the settlement of mutual accounts and claims. Among other powers vested in the arbitrators was that of deciding in what manner the plantation and slaves should in future be managed and controlled, and what disposition should be made of the crops, in whose name they should be shipped, and by whom applied until the claims against it should be liquidated. The then existing crop was placed under the control of the arbitrators. The submission was signed by *Mrs. Cobb*, her husband, and *Lowry*, in July, 1846, and the arbitrators were required to render their award on or before the 10th February, 1847. It being found that the award would not be prepared at the time stipulated, an agreement for extension until the 15th March, was signed on the 18th January, 1847, by *Lowry*, and by *Cobb* in his individual name, and as agent of his wife. The arbitrators rendered their final award on the 15th March, 1847. It was spread upon the minutes of the court at the ensuing October term, upon the *ex parte* motion of *Lowry*; and on the like *ex parte* motion it was made the judgment of the court.

On the 7th January, 1848, *Mrs. Cobb* and her husband instituted the present suit. Her petition states the ownership of the plantation and slaves by herself and *Lowry*; that she had for many years the management of it, and of the crops, employing her husband as the overseer; that the defendant *Parham*, pretending to derive authority from the award of certain arbitrators, was about to deprive her of the control and supervision of the estate, and prevent her

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PARHAM.

from exercising her right of ownership over it. To prevent the injury that would arise from *Parham's* alleged usurpation, she asked and obtained an injunction. The defendants denied the right of the plaintiff to the supervision and control, and justified the acts of *Parham* under the award of the arbitrators.

The true question in the cause is, the binding force of the award upon the plaintiff. If it be binding, the judgment of the court dissolving the injunction cannot be disturbed.

It is conceded by the defendants that the award has not been duly homologated. It is also conceded that, no express authorization by *Mrs. Cobb* to her husband to extend the time for making the award has been proved. But they contend that a formal homologation is not necessary where the parties have themselves executed the award; and that the absence of an express authorization from the wife to extend the time, and the consequent defectiveness of the award, are cured by her voluntary execution of it.

We concur in opinion with the defendants' counsel, that an award rendered by amicable compounders could not be revised by the court for errors of judgment, and could only be attacked by reason of fraud or usurpation of power on the part of the auditors (see *Canty v. Beal*, 17 La. 285. *Davis v. Leeds*, 7 La. 477); and that, in the absence of objections of that nature, the execution of the award by the parties would entitle them to its benefit, as fully as though it had been duly homologated. We also concur with the counsel for the defendants, that a subsequent execution by the wife, would cure the want of an original authority in the husband to assent for her to the extension of time.

This brings us to consider the facts upon which the defendants rely, to show an execution of the award by *Mrs. Cobb* and her husband. To appreciate them a brief notice of the terms of the award will be necessary.

The arbitrators, by their award, divested both *Lowry*, and *Cobb* and wife, of all personal control of the estate and its cultivation, leaving *Mrs. Cobb* however, the privilege of occupying a dwelling house on it. They appointed *Parham* to take its entire control and administration. He was required to manage the property as a prudent administrator; was empowered to employ and discharge overseers, who were to be governed by him alone, and not to be under the control of the joint owners, a special authorization being given to him to employ *Cobb* in that capacity if he should so desire. He was to ship the crops in his name as agent, and control the proceeds, subject to the instructions given by the award. These were to apply the product of the estate, first to the payment of its expenses; next to the payment of certain yearly allowances for the individual use of *Mrs. Cobb* and *Mr. Lowry*; and then to the payment of the mortgage debts due to *Burke, Wall & Co.*, *Hynes*, and the heirs of *Mitchell*. His administration was to continue until January, 1850. Provision was made for the subsequent partition of the estate; also for the appointment by the district judge of a suitable person to act in his place, in the event of his death, removal, or inability. The whole character of the award points to the withdrawal of the estates, for the time being, from the hands of the proprietors, whose interference, as demonstrated by their former quarrels, was deemed incompatible with the true interests of themselves and their creditors.

Under this award we find *Parham* entering upon his administration. *Burke, Wall & Co.*, the former factors, recognized him as agent of the estate, and paid over to him, or upon his drafts as agent, the funds in their hands proceed-

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ing from the crops shipped by him &c. Under the eye of *Mrs. Cobb*, who continued to occupy the dwelling house, her husband was employed as an overseer by *Parham*, and received his pay as such, through *Parham's* draft as "agent of Backhorn" upon the New Orleans factor. *Mrs. Cobb* received upon *Parham's* draft, her allowance of \$1,000; she also received another sum which was ordered by the award to be paid to her, and which was accordingly, by written directions of the arbitrators, placed to her credit by *Burke, Wall & Co.* During a period of several months there appears to have been no attempt on her part or that of her husband, to interfere with his administration, thus conducted in their presence.

All these facts, as well as others which it is not necessary to detail, can be regarded in no other light than as an assent to, and execution of, the award by the plaintiffs. To confirm an act not binding upon a party, a formal instrument is not indispensable. A voluntary execution involves a renunciation of the exceptions which might have been opposed to it.

It is said, however, that, by consenting to receive the proceeds of her own crops, *Mrs. Cobb* should not be prejudiced, for in doing so she received what was her own. The answer is, they were not her own. *Lowry* was her co-proprietor. Having received them from *Parham*, who expressly declared himself to be the agent of both parties under the award, to repudiate his capacity afterwards would involve a legal fraud both upon him and upon *Lowry*.

It is equally inadmissible to say that, the plaintiffs could thus partially execute the award and repudiate those portions of it which were not directly comprehended in the execution. "L'exécution partielle démontre, comme l'exécution totale, la volonté de confirmer l'acte vicieux; c'est une approbation tacite. Duranton, vol. 13, § 280. See also *Kinnard v. Harris*, 2 B. & C. 801. The award was entire, and the plaintiff having accepted its benefit, must take its burdens.

It has been objected that *Lowry* had himself acted against the spirit of the award, by attempting to buy out creditors, for the purpose of using their claims to oust the plaintiff. The testimony on this subject is conflicting, and at most established only negotiations to that end. The unconsummated intentions of the defendant cannot effect his right under the award.

Judgment affirmed.

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COBB et ux. v. HYNES.

A creditor who has obtained a judgment, with an acknowledgment of his rights as a mortgagee, may seize other property than that mortgaged to him. All the property of the debtor is liable for the payment of his debts.

The fact that a partial payment has been made on a judgment, which has not been credited on the *fi. fa.*, will not authorize an injunction for the entire amount of the execution.

Where no answer has been filed by an appellee, an application to amend the judgment in his favor by allowing him higher damages on the dissolution of an injunction, will not be considered.

APPEAL from the District Court of Madison, *Selby, J. Bemiss*, for the appellants. *Thomas and Amonett*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. *Hynes* obtained a judgment against the present plaintiffs for a sum of money, with a recognition of his rights as mortgagee of a tract of land. See 2d Ann. 365. An execution was issued and levied upon other land. *Cobb* and wife then obtained an injunction, alleging in their petition two grounds for relief: first, that the mortgaged property was alone liable for the payment of the judgment, and that it could not be enforced against other property; secondly, that a payment had been made upon the judgment, which had not been credited. The first ground was properly disregarded by the district judge. All the property of a debtor is liable for the payment of his debts. Upon the second ground the court relieved the parties, the payment being proved. The facts of a partial payment was not a justification for enjoining the entire judgment, and damages were, therefore, properly allowed as to the unsatisfied portion of the debt.

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HYNES.

In the brief presented by the appellee he asserts his right to higher damages than were assessed by the district judge; but as no answer to the appeal was filed praying for such relief, the application cannot be considered.

Judgment affirmed.

ROBERTSON, Trustee, &c. et al. v. TRAVIS, Sheriff.

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108 210

Where a petition for an injunction is presented by a party who describes himself as a trustee, it is unnecessary that his capacity as trustee should be repeated in the affidavit.

Where on an application to obtain an injunction, made by several persons representing distinct interests, the affidavit is made by only one of the parties, and it does not appear either from the petition or the affidavit that he acted as the agent of the others, the injunction must be dissolved as to the parties by whom no affidavit was made.

APPPEAL from the District Court of Carroll, *Selby, J. R. N. and A. N. Ogden*, for the appellants. *Slacy and Sparrow*, for the defendants. The judgment of the court was pronounced by

KING, J. The plaintiffs, *Hall and Robertson*, the latter representing himself to be the trustee of the Commercial Bank of Natchez, and the remaining plaintiffs representing themselves to be the trustees of the Planters' Bank of Mississippi, enjoined the execution of two writs of *fieri facias*, on the allegation that the sheriff was about to sell the property seized without an appraisal, which would expose them, as junior mortgagees, to loss. A motion was made to dissolve the injunction on the face of the papers, on the ground that the plaintiffs had not made the oath, nor furnished the bond required by law. The motion was sustained, and the injunction dissolved with damages. The plaintiffs have appealed.

The affidavit upon which the injunction was granted, was made by *Robertson* alone, and is as follows: "Declares that the facts set forth in the foregoing petition for injunction so far as they are stated as of his own knowledge, are true, and so far as they are stated as derived from the information of others, he believes them to be true." It is objected to this affidavit, that it is vague and uncertain, and does not show that *Robertson*, who made it, is the trustee of the Commercial Bank, nor that he is the agent of *Hall* or of the remaining defendants, who are trustees of the Planters' Bank.

As far as relates to the Commercial Bank of Natchez, the oath of *Robertson*,

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one of the trustees, is sufficient. A reference to the petition shows that none of the facts averred are stated as having been derived from the information of others, and the petitioner must be understood as having deposed to the truth of all his allegations. His quality of trustee, is stated in the petition, to which the oath is appended, and it was not necessary that it should be repeated in the affidavit.

The objection taken that, *Robertson* does not appear, either from the petition or affidavit, to have acted as the agent of the remaining parties plaintiff, who represented separate and distinct interests, is well taken. Those parties could only have claimed an injunction upon swearing to the truth of the allegations on which they relied as authorizing a resort to the remedy, and on giving the bond required by law. They have neither taken the required oath, nor joined in the bond, and as to them the injunction was properly dissolved.

But as the allegations of the petition are to be taken as true on a motion to dissolve, we must take the fact to be as alleged that the sheriff was about to sell irregularly, and although the trustees of the Planters' Bank had not fulfilled the prerequisites for an injunction, and it was properly dissolved as to them, we are not prepared to sustain the decree of one per cent damages, even as to them, but will leave the question of damages open as to all the parties.

Robertson, however, furnished the bond and security required by the judge. It is true that he is not described in the instrument as the trustee of the Commercial Bank of Natches, but he is sufficiently identified with the plaintiff in the suit, by that part of the bond reciting the condition on which it is given, in which it is said: "That whereas *William Robertson* and others have this day presented a petition to the Tenth District Court," etc. We think that *Robertson* and his sureties are bound upon the bond, and that the defendants may recover upon it, if it should be found that the injunction has wrongfully issued. As regards the Commercial Bank, we think the judge erred in dissolving the injunction upon the face of the papers.

It is, therefore, decreed that so much of the judgment appealed from as dissolved the injunction as to the plaintiffs *Hall*, and the trustees of the Planters' Bank of Mississippi, be affirmed; and in other respects that the said decree be reversed, and the cause remanded to be proceeded with according to law, the defendants paying the costs of this appeal; the question of damages being reserved.

FRENCH v. THE MECHANICS AND TRADERS BANK.

Executory process cannot be issued on a mortgage containing mutual covenants, which was never accepted by the mortgagee, there being no authentic evidence that the latter ever bound himself to the implied covenants contained in the act. The institution of proceedings under the mortgage is not a sufficient acceptance to authorize the issuing of executory process. The evidence on which executory process issues must be authentic. The judge, in granting the order, can take no cognizance of other evidence.

APPEAL from the District Court of Concordia, *Barry, J. Stacy* and *Sparrow*, for the appellant. *T. P. Farrar*, for the defendants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal taken by the plaintiff from a decree of the

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AND TRADERS
BANK.

Court of the Eleventh District, dissolving an injunction which had been issued against proceedings by executory process, which had been taken by the Mechanics and Traders Bank, on a mortgage given by *French* as a part payment of a judgment which the bank held against *Thomas Alexander*. In the petition for injunction, besides the distinct ground on which the plaintiff claims relief, there is an allegation that the order directing the executory process, and also the writ issued, are irregular and illegal, for the cause assigned and others on the face of the record. This allegation authorizes the examination of the regularity of the proceedings.

The objection made by the plaintiff on this ground is, that there is no evidence that the mortgage on which the proceedings are instituted was ever accepted by the bank.

The mortgage was executed on the 30th of November, 1844, by the plaintiff, with the renunciation of his wife, who alone were parties to it. It was given in part payment of a judgment the bank held against *Alexander*. As it contained mutual covenants, it is obvious that it was without effect until accepted by the bank, and the bank bound itself to release *Alexander* to the extent of the amount of the mortgage thus given in payment. The act of mortgage was never accepted by the bank, and there is no evidence, by authentic act, that the bank ever bound itself to the implied covenants contained in the act.

It is requisite that the evidence on which executory proceedings are had should be by authentic act. The judge in granting the order for execution can take no cognizance of matters resting *en pais*. The bank instituted proceedings on this mortgage, in October, 1846, and it is urged that this fact is an acceptance of the act of mortgage. But we think in an act of mortgage of this kind there is no reason for extending the rule which requires the highest evidence of the contract between the parties, as well as that the evidence should be complete and entire before the party can avail himself of this summary proceeding. Had the mortgage been a mere security for a debt, perhaps there might have been ground for presuming that the creditor accepted what was for his benefit. In a matter like that before us, which had been left open so long and in which the party executing the mortgage required the partial extinction of a judgment and the substitution of new security, no judicial action ought to be taken as on an act imparting a confession of judgment.

The judgment of the District Court is, therefore, reversed, and it is decreed that the executory proceedings instituted against the plaintiff in injunction be dismissed, with costs in both courts.

CHAPMAN, Assignee v. THE NEW ORLEANS GAS LIGHT AND
BANKING COMPANY et al.

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125 147

Where certain shares of the stock of a bank were attached, and, on a judgment rendered in favor of the plaintiff in attachment, were sold under execution, an intervenor in the attachment suit, who claimed the stock, and was subsequently adjudged to be the owner of it by a superior tribunal, on a writ of error sued out by him, but which did not suspend execution, cannot recover against the bank, the value of the stock, with profits, dividends, &c., for permitting the marshal to transfer the stock to the purchaser of the judicial sale, and for refusing to transfer the shares to him on the ground of their sale and transfer to

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the the purchasers at the marshal's sale; nor will the fact that the stock was sold without appraisement, at a time when an appraisement was not considered necessary, though subsequently adjudged to be so, subject them to liability, there having been no neglect on their part, and they being justified in believing that the public officer acted according to his duty.

Whatever effect the want of appraisement may have on a sale of moveable property under execution between the parties to the sale, third persons cannot consider such a sale as null on that account.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Loc-kett, Goold, and Roselius*, for the appellant. *L. Janin*, for the defendant. *Grymes*, for the parties cited in warranty. The judgment of the court (*Slidell, J.* not sitting, being a stockholder in one of the banks,) was pronounced by

Eustris, C. J. On the 4th of May, 1841, a suit was instituted in the late Commercial Court of New Orleans, by *James W. Zacharie & Co.* against *Francis C. Black*, in which certain shares of the stock of the Gas Light and Banking Company and of the Carrollton Railroad and Banking Company, were attached. *Black* appeared in the suit, and on his application it was removed from the Commercial Court to the Circuit Court of the United States for this district. *Black* pleaded that, prior to the attachment, he had assigned the stocks attached by a deed of trust, for the benefit of all his creditors, to *James H. Chapman* of South Carolina, who is the plaintiff in the present suit. After the removal of the suit by attachment, *Chapman* filed a petition of intervention, and became a party to it, in order to protect the interests secured under the deed of trust. The plea of *Black*, the defendant, the object of which was to release the stocks from the effect of the writ of attachment, was overruled by the court on the 13th of January, 1842, and in March of that year a verdict was rendered in favor of *Zacharie & Co.* against *Black*, for the sum of \$8,000, and judgment rendered on it accordingly. From this judgment *Black* took his writ of error to the Supreme Court of the United States, but gave a bond for costs only. *Chapman's* petition was dismissed by the same judgment, and he also took his writ of error, which was allowed as a supersedeas; but the judge afterwards rescinded that part of his order which gave effect to the writ of error as a supersedeas, on the ground of the insufficiency of the bond given by *Chapman*. The Supreme Court of the United States reversed the judgment of the Circuit Court, and remanded the case with directions to award a *venire facias de novo*, on the ground that the Circuit Court erred in ruling that there was a sufficient debt established by the evidence to maintain the attachment, and also in directing the jury that the delivery of the stock was not complete, unless the transfer was entered upon the books of the banks. The case is reported in 3d Howard, 509, and was decided in 1845.

On the 11th of April, 1842, the plaintiffs, *Zacharie & Co.*, took out an execution on the judgment against *Black*, and the stocks before mentioned were seized under it, and after due advertizements were sold by the marshal. At this sale *Jules Lavergne* became the purchaser of one hundred shares, *G. Didier* of ninety, *James W. Zacharie* of three hundred and ten shares of the Gas Bank stock, and *James W. Zacharie & Co.* of the six hundred shares of the Carrollton Bank stock, all those stocks having been attached in the suit, and claimed in the petition of intervention of the present plaintiff, *Chapman*.

The present suits, which have been consolidated and argued together, are instituted by *Chapman* against the two banks, under the assignment from *Black* alleged to have been made previous to the attachment suit, for the purpose of

compelling the transfer and delivery of the stocks thus attached and sold, or, on default thereof, for the recovery of their value, with the profits, dividends, &c.

The defendants set up the marshal's sale under those proceedings as a defence to the action, and call the purchasers, and the late marshal of the United States in warranty, to defend the suit, and ask such judgment against them as may be rendered against the defendants. The parties called in warranty pleaded the general issue, with an averment that that they are not bound to indemnify the defendants. The District Court rendered judgment in favor of the defendants, and the plaintiff has appealed.

On the 22d of March, 1847, the case of *Zacharie & Co. v. Black* having been remanded to the Circuit Court, judgment was rendered in favor of the defendant as well as of the intervenor against the plaintiff, and these suits were instituted in April following. The district judge decided the case on the effect he gave to the judgment of the Circuit Court, which was afterwards reversed, as we have seen, on a writ of error. He considered that by that judgment the right of *Zacharie & Co.* to attach the stock standing in *Black's* name on the books of the banks, and *Chapman's* title to them under the assignment, were directly adjudicated upon; that, if that judgment had never been appealed from nor reversed, the validity of the marshal's sale could not be questioned; and that, in that respect, there is no difference between the consequences of no appeal having been taken, and one having been taken which did not operate as a supersedeas, as in the present case.

It appears to us that the only question to be examined under the issue made between the plaintiff and the defendant is, as to the responsibility of the latter for their acts as stated in the petition. They refused to deliver and transfer to the plaintiff the stocks assigned to him by *Black*, on the grounds that they were attached, and were afterwards sold under execution; the validity of these grounds must, therefore, be considered.

The Supreme Court of the United States determined that the stocks were not liable to the attachment of *Zacharie & Co.*, but passed, by the assignment, to the plaintiff in this suit—not, however, with respect to the legal title but the equitable title, which became thereby vested in the assignee, so as to bind the attaching creditors as well as the banks, as soon as they had notice thereof, and that the attaching creditors in this case had notice previous to the issuing of the writ of attachment.

In relation to the non-delivery, or refusal of transfer on the books of the banks, previous to the service of the attachment, which was made on the 4th of May, 1841, each of the banks acted on reasons applying to itself alone.

The Carrollton Bank held the stock in pledge for a stock note of *Black*, and until that note was paid the transfer of the stock could not be insisted on. The refusal of the Gas Bank to transfer the stock is given in the letter of its cashier, of date the 20th of April, 1841. The power of attorney from *Black* to transfer the Gas Bank stock was in favor of the cashier, but he, not considering it sufficiently formal, returned it, with a request that another might be sent in conformity with the conditions he suggested. At all events, he refused to act as the attorney of *Black* in transferring the stock, and gave immediate notice of his refusal to the present plaintiff. He was not bound to accept the mandate, and no responsibility can attach to the bank for his refusal to act under it. Nor do we find any act amounting to a default on the part of the Gas Bank, in refusing to transfer and deliver the stock to the plaintiff, up to the time of the attachment; and after that, we think, the attachment was a sufficient reason for its non-delivery.

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ry and refusal to transfer. Indeed, it seems, from the view the Supreme Court of the United States took of the matter, that the transfer or non-transfer of the stocks on the books of the banks precludes no right whatever, inasmuch as it was the equitable interest in them, and not the apparent title on the books, which constitutes the ownership. The case does not appear to have been prepared with a view to any responsibility as to mere delay on the part of the banks in relation to the transfer and delivery; the effect of their acts touching the sale under execution remains only to be considered. In relation to that ground of responsibility the doings of each are similar, and can be examined together.

We have seen that *Black* was a party defendant in the Circuit Court of the United States, and that *Chapman*, the plaintiff in this suit, was a party by his intervention.

The petition of intervention set up the ownership of the stocks, and averred that they were wrongfully levied upon by the attachment, and prayed in conclusion that it be dismissed, and the petitioner decreed to be the owner thereof under the assignment from *Black*, &c. The Circuit Court decreed that judgment be entered in favor of *Zacharie & Co.*, plaintiffs, against the defendant, *Francis C. Black*, for the sum of \$8,000, with costs of suit, and that the petition of intervention of *James Chapman*, claiming the stocks of the Carrollton and Gas Banks attached in this case, be dismissed at his costs. On this judgment a *fiery facias* was issued, and the stocks attached were levied upon and sold. After the sale, the marshal transferred the stocks to the purchasers on the books of the banks.

It is urged by the counsel for the plaintiff that this judgment decreed no privilege on the stocks attached. This is true; but *Black* having appeared in the Circuit Court, the judgment against him was personal, and a *fiery facias* was lawfully issued on it. The claim of *Chapman* having been determined on in favor of the attaching creditors, the stocks were necessarily subject to be seized as *Black's* property and sold as such, unless the execution was stayed. The action of the banks appears to be confined to their permission to the marshal to transfer the stocks to the several purchasers on their books. The subsequent reversal of the judgment of the Circuit Court does not affect their responsibility, which seems to be confined to this act. Under the circumstances, we do not see how the banks could have acted otherwise. True they had notice of the antagonist claims of *Chapman*, but those claims had been adjudicated upon, and he had suffered execution to issue, when he could have stayed it by giving security. He thought proper not to do so, but to leave the process of the court to its result. We do not think the defendants were bound to impede or arrest it, and in authorizing the public officer to do his duty in carrying into effect a judicial sale by having the use of their transfer book for the purpose of vesting the legal title in the purchasers of the stocks, we think they were justified. They were not bound to assume the responsibility towards the purchasers of retarding or defeating their purchase. But it is contended by counsel that the sale under execution is a nullity, in consequence of their having been no appraisement made of the stocks, and the cases of *Phelps v. Rightor*, 9 Rob. 531, and *Stockton v. Stanbrough*, 3 Ann. 390, are referred to in support of that opinion.

That appraisement of moveable property was necessary to the validity of a sale under execution, was first determined in the case of *Phelps v. Rightor*, in 1845. It is admitted by counsel that until this decision, sheriffs did not consider it necessary to appraise moveable property, and never appraised it; such at least

was the uniform practice in New Orleans. Whatever effect the want of appraisalment may have on a sale of moveable property, under execution between the parties to the sale, yet third persons cannot consider a sale of moveables as null on that account.

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When the stocks were advertized for sale the plaintiff, by his attorney, gave notice to the banks of his prosecution of his writ of error, but of nothing else, except of his persisting in his claims under his assignment. Had the attorneys applied to the Circuit Court to arrest the proceedings for want of an appraisalment previous to the sale, there is reason to believe that the sale would have been arrested and an appraisalment made; but it is obvious that neither of the parties thought it material. We do not think that, as matters now stand, to wit, the sale of the stocks left entire and no attempt made by the plaintiff to disturb it, or to have any recourse whatever against the purchasers, the banks can be held liable for permitting the transfer to be made by the marshal, although the sale was made without any appraisalment. They were justified in believing that the public officer acted according to his duty, and it was a fair presumption *omnia rite acta fuisse*. Besides, by the admission, there was no neglect on their part, and they merely gave effect to the acts of a public officer, in the forms in which they had been usually vested.

But we are asked to give judgment against the purchasers of the stock; and it is said that the stocks purchased by *Zacharie* and *Zacharie & Co.* are still in their names on the books of the banks. This suit is not against them; it is against the banks on the issues we have stated. *Zacharie & Co.* are cited in warranty to defend the banks in this suit, but the plaintiff has prayed for no judgment against them. Why the sales should be permitted to stand on the case presented by the plaintiff, is a matter resting exclusively with him. If the price be an adequate one, it is his interest that they should remain in force; but, in the mean time, to make the banks liable to him for the stocks, or their value, would, it seems to us, be the height of injustice.

Judgment affirmed.

PATTISON et al. v. EDMONSTON et al.

Where after a judgment has been rendered, but before it is signed, defendant purchase a judgment rendered against plaintiff for a larger amount, and takes a rule on the latter to show cause why a new trial should not be granted, and why, in case of its refusal, the judgment should not be declared to be extinguished, the rule should be made absolute and the judgment declared to be extinguished by compensation. C. C. 2203. *Per Curiam*: Plaintiff would have been entitled to an injunction, and no reason has been suggested why affect should not be given to the plea of compensation on the trial of the rule, when the parties were before the court with their evidence.

APPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J. and H. H. Strawbridge*, for the appellants. *Murphy*, for the defendants. The judgment of the court was pronounced by

KING, J. *Carter & Co.* having obtained a judgment against the present plaintiffs, issued a *fieri facias*, the execution of which the plaintiffs enjoined, alleging that the judgment was illegally rendered, for various reasons stated in their petition. The injunction was, on a trial conducted in the absence of the plaintiff's counsel, dissolved with damages. The plaintiffs thereupon took a rule on the de-

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defendants to show cause why a second trial should not be granted, and further to show cause, in the event of the said trial being refused, why the judgment in favor of *Carter & Co.* should not be declared satisfied and extinguished by compensation, the plaintiffs having become the owners of a judgment against *Carter & Co.* for a larger amount. The rule was discharged, without prejudice to the right of the plaintiffs to sue out an injunction for any offset which they might have to oppose to the judgment of *Carter & Co.* against them. The plaintiffs have appealed.

We think that the judge erred in discharging the rule. As regards the regularity of the proceedings anterior to the rule, it is unnecessary to express an opinion. The plaintiffs are disposed to waive the alleged irregularities, if they exist, and to rely on their plea of compensation, which we think ought to have been sustained. Subsequently to the rendition of the judgment in favor of *Carter & Co.* against them, they purchased a judgment for a larger amount, rendered in favor of other parties against *Carter & Co.*, and the latter were notified of the transfer. From the date of the notice the parties became mutually indebted, their respective claims were equally liquidated and due, and compensation took place, the effect of which was to extinguish the judgment of *Carter & Co.* C. C. art. 2203.

The plaintiffs would have been entitled to an injunction on this ground, and no reason has been suggested why effect should not have been given to the plea of compensation on the trial of the rule, when the parties were before the court with their evidence, instead of driving the plaintiffs to an injunction to accomplish the same end. It is proper to observe that no objection was made to the proceeding by rule.

The judgment of the District court upon the rule to show cause why the judgment of *Carter & Co.* against the plaintiffs should not be declared satisfied by compensation is reversed, and it is ordered that the said judgment of *Carter & Co.* be satisfied and extinguished by compensation. In other respects the judgment appealed from is affirmed, the defendants paying the costs of this appeal, and the plaintiffs those of the costs below, with the exception of the costs on the rule, which are to be borne by the defendants.

WILSON v. PHILLIPS.

No recovery can be had in an action for the price of plaintiff's interest in a tract of land without proof of delivery of possession, where the price was payable only after delivery of possession, and such delivery was alleged in the petition.

Parol evidence is inadmissible, in the absence of any allegations of fraud, to contradict or alter a written act of sale.

APPEAL from the District Court of Madison, *Selby, J.* *R. C. Downes* and *Stacy*, for the plaintiff. *Phillips*, appellant, *pro se.* *Thomas* and *Snyder*, on the same side. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff, who claims as the assignee of *Hall* and wife, sues the defendant for the sum of \$3,000, upon a contract of sale of their interest in certain lands and the improvements thereon, and for the further sum of \$329, for certain moveables alleged to have been sold to the defendant.

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The contract with regard to the lands, which is without date, but is signed by *Hall* and his wife and by the defendant, declares that they sell, release, and make over to *Phillips* all their right title and interest in and to a section of land (describing it) on which the vendors reside, formerly belonging to *S. C. Phillips*, deceased; that in consideration of such sale *Phillips* binds himself to pay the vendors "\$1,500 on account of improvements made on the said tract of land up to the time when possession shall be delivered to the said *Phillips*;" "secondly, that *Phillips* shall use all proper and reasonable efforts to obtain a full and indisputable title to said land, and hereby engages to proceed therein to the best of his knowledge and ability; thirdly, that the said *Phillips* shall on obtaining such title pay over to the parties of the first part the further sum of \$1,500;" "fourthly, the said *Phillips* engages to sustain the necessary law expenses, and also those arising from the purchase of certain claims to said land, provided said expenses do not altogether exceed \$1,000. It is further understood and agreed upon that the parties of the first part are hereby bound to execute any further instrument of writing which may be necessary for the carrying into effect the true intent and meaning of these presents, and for the securing the parties of the second part in the premises; and further, that when, in addition to the above, the claims of the heirs of *Fanny Wallace*, legatee of *S. C. Phillips*, shall have been obtained by the party of the second part, the title shall be deemed complete between the parties to this instrument."

The instrument appears not to have been executed in duplicate, and remained in the possession of the vendors. In his petition the plaintiff alleges that the contract was signed on the 1st December, 1843, and that *Phillips*, in virtue of the contract, obtained possession of the land on or about the 1st January, 1844.

The plaintiff was bound to prove that possession had been given. This was essential to his recovery under the contract. The absence of any evidence to that effect is an insuperable barrier to the plaintiff's present success.

As the contract may be the subject of future litigation, it is proper to state that we think a portion of the testimony of *Nicholson*, a subscribing witness, was improperly admitted. This witness stated that he was present at the sale: "That the title of the vendors was considered defective, and the title was supposed to be in *William Henderson*. That *Hall* and his wife told *Phillips* at the time, of the defect of the title. That the second \$1,500 was to be paid when *Phillips* obtained *Henderson's* title. That *Henderson* was the only person supposed to have any claim at the time of the sale. That there was supposed, at the time, to be an absent heir, but *Phillips* was willing to take the title in *Henderson*, and risk the claims of the absent heir, who was supposed to be dead, and *Phillips* said at the time when he obtained *Henderson's* title, his, *Phillips'* title would be perfect." If this witness had been called to prove that it was understood and acknowledged by the contracting parties at the time that *Henderson* was the owner of the rights of all the heirs, or was himself the sole heir of *Fanny Wallace*, legatee of *S. C. Phillips*, his testimony to that effect would have been admissible; but as the testimony stands it tends to contradict and change the written agreement. Under that agreement the title was to be deemed complete when the defendant should have obtained the claims of all the heirs of *Fanny Wallace*; but according to the parol testimony the purchaser was to take the risk of the outstanding claim of an absent heir.

With regard to the claim of \$329 for moveables sold, the evidence is also defective. It perhaps approaches to proof of an agreement to purchase; but there is no proof of delivery by the vendors.

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We can only account for the verdict of the jury in favor of the plaintiff, upon the supposition that they acted upon their own knowledge with regard to the controversy, beyond the evidence offered at the trial.

It is therefore, decreed that the judgment of the District Court be reversed, and that there be judgment as in case of non-suit, the plaintiff paying the costs in both courts.

LEDOUX et al. v. GOZAN

As a general rule the trust reposed in an agent is personal; but this is modified by the usages of trade, where the interest of the employer and reasonable convenience require the custody of the property to be delegated to another.

When the nature of the business requires the employment of a sub-agent, the agent is not ordinarily responsible for the negligence or misconduct of the latter, if reasonable diligence has been used in the choice of such sub-agent.

An agent cannot be made responsible to his principal for exceeding his powers, where no injurious consequences are proved to have resulted therefrom to the latter.

Where a balance has been struck, and an account rendered by a factor to his principal, which is acquiesced in by the latter, interest may be charged, subsequently, on such balance, though formed in part of anterior interest. *Aliter*, where the account is not acquiesced in.

APPEAL from the District Court of Carroll, *Selby, J. Thomas and Snyder*, for the plaintiffs. *Stacy and Sparrow*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The principal subject of controversy in this cause is a loss upon a quantity of cotton, which the defendant, a planter, consigned to the plaintiffs, his factors. The plaintiffs sold it at nine cents per pound; but, on delivery it was found to be wet and damaged, and the purchaser refused to keep it. The pressmen, with whom it was deposited by the plaintiffs, paid them a sum in compromise. The plaintiffs credited this amount in account with defendant, as also the nett proceeds of a subsequent sale, at a reduced price. The defendant before suit, disputed the correctness of plaintiffs account, as presented, only with regard to the loss upon the damaged cotton; insisting that the plaintiffs should have given him an additional credit, over the amount received from the pressmen, equivalent to the amount of the cotton at nine cents.

We cannot adopt the position assumed by the defendant in his correspondence and by his counsel in argument, that it was immaterial whether the damage arose from the plaintiffs' negligence, or that of the pressmen. It is in general true that the trust reposed in an agent is personal. But the general rule is, in many cases, modified by the usages of trade, where the interest of the employer and reasonable convenience require the custody of the property to be delegated to another. Where the nature of the business requires the employment of a sub-agent, the agent is not ordinarily responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice. Here it was necessary, and according to the usual course of business, to send the cotton to a press, to be taken care of; and there was not a want of due care on the part of the plaintiffs in the selection of a depository, nor subsequent negligence on their part before the damage was found to be done.

It is fully proved that the cotton arrived at New Orleans in good order. The

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pressmen contended that it was wet before it arrived at the press and could be housed, to such a degree that they could not house it for fear of spontaneous combustion. The evidence appears to authorize that view, and to excuse the omission; but does not excuse the omission of other precautions which it is proved might still have been taken, and would have prevented the damage from being as great as occurred. We assume, therefore, that the pressmen did incur a liability to the defendant.

The plaintiffs have shown no authority to make a compromise with the pressmen; and it may be conceded that, in doing so without consulting their principal, they exceeded their powers, and made themselves answerable to him. The law is clear that when an agent violates his obligation to his principal by exceeding his authority, he must indemnify his principal if injurious consequences result. The defendant says: "I will take the \$500 you received from the pressmen; but I hold you for the excess that you ought to have got from them, and have thrown away by the compromise." Now, the measure of damages is the injury sustained by the unauthorized act; and this involves the inquiry whether, under the evidence, we can say that the pressmen could have been held liable for a greater amount. Upon comparing the price for which the damaged cotton was sold with the standard of the first sale, assuming the weights of the uninjured bales of the same lot as a fair average, and making some allowance for a portion of the damage as attributable to inevitable accident by reason of the weather during its transit from the levée to the press &c., we feel bound to adopt the conclusion of the district judge, and hold the compromise not injurious to the principal.

The answer of the defendant sets up usury.

When a balance is struck and an account is rendered by a factor to his principal, and is acquiesced in, there is nothing illegal in charging subsequently interest on such balance of which anterior interest formed a component part.

There is an item of \$197 86, charged for interest in the account rendered on the 30th June, 1841. We cannot allow interest upon the whole balance struck on that day, of which that item was a component part, as the defendant did not acquiesce in that account when rendered to him. In the account sued upon there is a claim of \$12 50 as a commission of two and one-half per cent for a cash advance, to which the defendant objects, and which must be disallowed.

We cannot open the account rendered in May, 1840. Under the evidence the defendant must be considered as having approved that account, and sanctioned the payment made on the day of its rendition, by the transfer to his credit of the balance due by *G. W. Goza & Co.*

It is, therefore, decreed that the judgment of the District Court be reversed, and that the plaintiffs recover of the defendant the sum of \$1046 78, with interest on the sum of \$310 23 from the 30th June, 1841, until the 14th July, 1841; and on the sum of \$348 92, from the 14th July, 1841, to the 22d October, 1841; and on the further sum of \$848 92 from the 22d October, 1841, until paid, and costs of this suit in the court below, those of this appeal to be paid by the plaintiffs.

CONNOLLY et al. v. AUTENRIETH et al.

A memorandum in writing, containing the terms of a transaction, drawn up in the presence of all the parties interested, and signed by two of them who incurred the heaviest obligation under it, and delivered to a mutual friend of the parties for the purpose of being recorded, will be binding without any formal acceptance by parties who, though they did not sign it, afterwards sued to enforce it.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preston*, for the plaintiffs. *Schmidt and Roselius*, for the appellants. The judgment of the court (*Slidell, J.* not sitting,) was pronounced by

KING, J. The plaintiffs aver that they, and the defendant *Sarah Connolly*, are the only heirs of the late *Felix Connolly*, deceased, who died possessed of property to a large amount, most of which, they allege, was acquired by the deceased in the name of *Sarah Connolly*, who had no interest in it at the dates of the several purchases, but who now asserts ownership of the whole property thus acquired. They aver that *Sarah Connolly* promised to convey to her mother, one of the plaintiffs, two lots of ground belonging to the succession of the deceased, with the buildings and improvements standing upon them, and to discharge a mortgage debt with which they were encumbered, amounting to \$2,000; that she also admitted that two other lots were devised by *Felix Connolly* to the minor children of his sister, *Mrs. Elliott*, and promised to make title in accordance with that disposition of the deceased. They pray that the mother may be decreed to be the owner of the two lots, with the buildings standing upon them, free from encumbrance; that the children of *Mrs. Elliott* be decreed to be the owners of the other two lots; and that a partition be made between the plaintiffs and the defendant, of the remaining property of the deceased.

On the trial, the following agreement was produced:

"In a family meeting of the family of *Felix Connolly*, deceased, his sister, *Sarah*, who had been entrusted with the settlement of her deceased brother's affairs, in order to satisfy the other members of the family, viz: her sister, *Mrs. Mary Mitchell*, *Mrs. Ellen Elliott*, her brother and her mother, agrees and promises to raise a mortgage of \$2,000, now resting on the property known as the homestead, and the house in which her brother *Felix* died, and to make a title to the same to her mother forever. Her sister, *Mrs. Mary Mitchell*, agrees and obligates herself to raise a mortgage of \$500, on the two adjoining lots bequeathed to the children of *Mrs. Elliott*. In witness whereof the two, namely, *Sarah Connolly* and *Mary Mitchell*, have signed this agreement.

"(Signed) SARAH CONNOLLY,
MARY MITCHELL."

"Witness, J. J. MULLON, November 11, 1846."

The district judge considered, that the agreement was a compromise, made for the purpose of adjusting all the conflicting claims of the parties relating to the succession of *Felix Connolly*, and rendered a judgment intended to give effect to its stipulations, from which the defendant has appealed.

The district judge did not, in our opinion, err. The adverse claims of the parties were the subject of frequent discussions amongst them. A friend of the family interfered with the view of reconciling their differences, and the result of

a conference which ensued was the above agreement, which must be viewed as a compromise, in which the plaintiffs relinquished their claims as heirs in consideration of the concessions made by the defendant in favor of her mother, and of the minor children of *Mrs. Elliott*. In pursuance of this agreement the defendant executed an act of donation to her mother, of the house and lot, previous to the inception of this suit.

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It is objected that the agreement was neither signed nor accepted by the parties, and has not been considered obligatory by themselves. But it is shown that the parties were all present when the compromise was made, and assented to its terms. It was signed by *Sarah Connolly* and *Mrs. Mitchell*, who incurred the heaviest obligations, and was delivered to a mutual friend for the purpose of being recorded. A formal acceptance of the act was not indispensable to give it effect. The parties in whose favor the stipulations were made, so far from considering that they are not obligatory, invoke the aid of the agreement in this suit, and found their claims in part upon it. It is true, however, that while they seek to enforce the stipulations in their favor, they have disregarded their own obligation to leave the defendant in the undisturbed possession of the remainder of the property alleged to belong to the deceased.

As we consider that the rights of the parties depend entirely upon the compromise, it is unnecessary to examine the bills of exception taken to other parts of the evidence received or rejected on the trial; or the objections urged to the right of the plaintiffs to claim as heirs of the deceased. The district judge gave a judgment in favor of the children of *Mrs. Elliott* for \$1,500, as, we presume, in lieu of the lots claimed, which, as we have seen, the defendant admits were bequeathed to them. The children were entitled either to the lots, or, if for any cause they could no longer be conveyed, to their value. The reason for this deviation from the terms of the act has not been stated. The plaintiffs, however, have not asked for a change of the decree in this respect, and the defendant does not complain that the judgment is more onerous in this form than if the lots themselves had been awarded.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

A transaction signed by a married woman without the authorization of her husband, if subsequently ratified by her, with the assent of her husband, will be obligatory.

THE judgment of the court, on an application for a re-hearing made in this case by the counsel for the appellants, was pronounced (*Slidell*, J. not sitting,) by

KING, J. In the opinion heretofore read in this cause we said, that the rights of the parties depended entirely upon the agreement entered into between them on the 11th November, 1846, which we held to be a compromise.

The terms of the agreement leave no doubt as to the intentions of the parties. It is admitted that *Sarah Connolly* stipulated: 1st, to convey to her mother a piece of property, designated as the homestead, free from a mortgage with which it was then encumbered. 2dly, that she admitted that an adjoining lot of ground, title to which then stood in her name, had been devised by her deceased brother, *Felix Connolly*, to the children of *Mrs. Elliott*, and became bound to convey title to them, if the act be obligatory. These are the two obligations which she

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incurred, in consideration of which the remaining heirs of the deceased abandoned the succession of *F. Connolly* in her favor.

It is contended, in the application for re-hearing that, in giving effect to this instrument, important principles of law have been violated, in this, that the instrument is neither signed by *Mrs. Connolly*, *Mrs. Elliott*, nor *John Connolly*, whose assent to the stipulations is not otherwise proved; and that *Mrs. Mitchell* was a married woman acting without the authorization of her husband. In view of these supposed defects, it is asserted, with apparent seriousness, that the instrument must be treated as a nullity.

Two important facts appear to have escaped the attention of counsel: 1st. That the defendant, prior to the inception of this suit, had actually executed the agreement as far as relates to her mother, by making to the latter a donation by public act of the property described as the homestead, and that in her answer filed in the cause she has not asked the revision of the motion. To this extent she has given voluntary effect to the agreement.

2dly. That *Mrs. Mary Connolly*, *John Connolly*, *Mrs. Elliott*, and *Mrs. Mitchell*, are all parties plaintiff in this action; that the two latter are joined and assisted by their husbands, and that in their petition they make the following averment: "Your petitioners further show that the said *Sarah Connolly* acknowledged in writing after the death of *Felix Connolly*, that the two adjoining lots (describing them,) belonged to the children of your petitioner *William Elliott*, and was bequeathed to them by their deceased uncle, *Felix Connolly*, which was done to avoid litigation, and which acknowledgement, being founded in fact, your petitioners are desirous should be confirmed," The prayer of the petition is in accordance with this averment.

This is certainly an affirmance of the agreement in the most express terms, by all the parties, and as regards the married women the affirmance is made with the authorization of their husbands. No circumstance occurred between the date of the agreement and the commencement of this suit indicating an intention on the part of the defendant to repudiate the contract, or treat it as null, because it had not been signed by all the parties, or because two of the parties were not authorized by their husbands to enter into it, or for any other cause. But, on the contrary, she went on, as we have seen, to fulfil the most important and onerous of its stipulations.

As regards the second stipulation, we have her acknowledgement in writing that a certain lot belongs to the children of *Mrs. Elliott*, in virtue of a bequest made by their uncle *Felix Connolly*. Her co-heirs admit the same fact in their petition, and ask that the property be decreed to the minors. If the agreement were liable to all the objections urged by the defendant's counsel, it would still be valid as her admission of the right of property in the children of *Mrs. Elliott*.

It did not escape our attention, on the first examination of the cause, that the district judge had deviated in his decree from the precise terms of the agreement, by awarding to the minor children of *Mrs. Elliott* a sum of money, instead of the specific property claimed. Not only is the fact adverted to in our opinion, but, before rendering the decree, the attention of one of the defendants' counsel was specially directed to it, and to the circumstance that it was not made the subject of complaint in his brief. Enquiry was made into the reasons of the district judge for this part of his decree, and whether, in the event of effect being given by this court to the agreement as a compromise, the silence of the defendant was to be considered as an assent that the sum awarded was a fair equivalent for the property claimed. No answer having been made, after reasonable delay, we

concluded from the continued silence of the defendant, after notice, that this feature of the judgment was not objected to. The first complaint made was upon the application for a re-hearing. Neither arguments nor authorities were necessary to satisfy us of the error into which the district judge had fallen on this point. The error was manifest, and had attracted our notice, and we only desired to be informed whether the defendant considered it more onerous than a judgment for the specific property, and desired its correction. The original decree must be changed as regards the children of *Mrs. Elliott* to one for the lot claimed.

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It is, therefore, ordered that so much of the judgment appealed from as awards to *Eleanor Connolly*, as tutrix of her minor children *Mary G. Elliott* and *William Elliott*, the sum of \$1,500, with legal interest, be reversed; and that said *Eleanor Connolly*, as tutrix of her said minor children, recover of the defendant *Sarah Connolly*, the lot of ground claimed by them in the petition, to wit, lot number nine in the square bounded by Colyseum, Robin, Magazine and Race streets, in faubourg Annunciation, in Municipality no. Two, of the city of New Orleans, according to a plan drawn by Joseph Pilié, on the 24th November, 1838, and deposited as plan no. 19, in the book of plans of J. B. Marks, notary public. In other respects, the judgment appealed from is affirmed; the appellees paying the costs of this appeal, and the defendants those of the court below.

ADAMS v. HARRISON.

No judgment can be rendered in favor of a party, declaring him entitled to a right of way over the estate of an adjoining proprietor on the ground of his being cut off from access to the public road or river, without showing, by proof of where the shortest road can be obtained with the least injury to the party required to submit to the servitude, from which of the adjoining proprietors the passage may be legally exacted. It may be that the passage is not due from the party from whom it is claimed, but from another contiguous proprietor.

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APPPEAL from the District Court of Iberville, *Nicholls, J. Deblieux*, for the plaintiff. *Micou* and *Labauve*, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiff sets forth in his petition three causes of action. *First:* He alleges that he is the owner of a tract of land fronting on the Mississippi river, measuring eight arpents, more or less, in front, by eighty arpents in depth, the side lines having an opening of ten degrees toward the rear, and complains that the defendant, *Harrison*, has unlawfully and without title, entered upon and taken possession of a part of this tract upon which he has committed various acts of waste. *Secondly:* He alleges that two bayous which pass through his plantation, and serve as natural drains, have been obstructed by the defendant by means of dikes and embankments, to the injury of his plantation. *Thirdly:* It is alleged that the defendant, pretending to have a right of way, is in the daily habit of passing over a portion of the plaintiff's land with his servants, wagons, &c., to his injury and annoyance. The petition concludes with a prayer that the defendant be decreed to restore that portion of the plaintiff's land, of which he has taken wrongful possession; that he be required to remove the obstructions which he has placed in the natural drains or bayous running through the plain-

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tiff's plantation; and that he be compelled to desist from the use of a part of the plaintiff's land, as a way.

The defendant, in his answer, avers that he is the owner of a plantation lying in the rear of and adjoining the plaintiff, composed, in part, of two lots, purchased from the United States, which lots include the land claimed by the plaintiff in this action. That the bayous were closed by his vendor, *Bolts*, more than ten years before the inception of this suit, with the knowledge and consent of the front proprietor; that the front proprietor had rendered the natural servitude more burthensome, in consequence of which *Bolts* had constructed these works for his own protection, and had made a canal sufficient to discharge the waters which accumulated in the bayous. He further avers that the road which he uses was made by those under whom he holds, more than ten years prior to the commencement of this suit, and was granted by the front proprietors for the use of his plantation, and has ever since been kept in repair, and used by himself and those under whom he claims. He also claims the servitude of way, by the prescription of ten years.

The three issues presented by the pleadings were all decided in favor of the plaintiff in the court below, and the defendant has appealed.

No questions in regard to the titles of the parties arise. Those of the plaintiff are spanish grants, confirmed by act of Congress, and those of the defendant were acquired by purchase from the United States.

The controversy in relation to the land, of which it is alleged that the defendant has taken illegal possession, is, in reality, one of boundary, the upper side line and the rear line of the plaintiff being those which are contested. The defendant contends that the direction of the side line is not in accordance with the original survey, and that its length is greater than is authorized by the plaintiff's title, in consequence of which it is made to include a part of the land acquired by him, or his vendor, from the United States.

The plaintiff holds under two grants. The first for about eight arpents front, by forty in depth, with a divergence in the side lines of ten degrees, and the second for the double concession of forty arpents by extending the side lines of the front tract.

It appears from the evidence that the plaintiff, and those under whom he holds, have always possessed the front tract by the boundaries which he now claims; that the side lines, as they now exist, have been established by fences and ditches for upwards of forty years, as far back as the extremity of the front concession; that as late as twenty years ago, there were trees bearing the surveyor's marks, along the whole length of the plaintiff's side lines, which have since disappeared from the front portion of the land; that, in 1806, *Lafon* made a survey of the entire tract, and placed boundary posts on the whole length of the side lines, and that the plaintiff's fences and ditches now occupy the same ground which they did at the date of *Lafon's* survey.

The upper side line of the plaintiff's front concession measures forty-two and two-thirds arpents in depth. At that distance from the present bank of the river, stands an old post, which appears to have been always recognized as the upper extremity of the front concession, although the grant is for but forty arpents in depth.

The townships in which the lands of both parties are situated, were surveyed by the United States in 1839. The instructions of the government to the deputy surveyors require them to reestablish the original lines of private claims when they can be found, when the excess in the quantity of the tract is not greater than forty acres. Acting under these instructions the United States surveyors re-

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traced the plaintiff's lines, and reestablished the rear boundary of the upper line of the front tract, at the point at which the old post now exists, forty-two and two-thirds arpents from the river, and thence extended the line with the same direction forty arpents towards the rear for the double concession. In their operations they were aided by the plan of the front tract of the adjoining proprietor. Their survey has been returned and approved.

A survey of the lands in controversy was also made under an order of the court granted in this cause. The surveyors returned a plat of the lands, and a report of their operations. They ascertained the upper side line of the plaintiff, as represented on their plat, to be the line as run by the surveyor of the United States. This was determined by identifying the old boundary posts on the front, by discovering the stumps of the boundary trees mentioned in the United States survey at the extremity of the front concession, forty-two and two-thirds arpents from the river, and by the surveyor's marks or line trees, which extended back to within a short distance of the defendant's clearing. They also ascertained the rear line as run by them to be identical with that of the United States surveyor.

It is true that the plaintiff's upper line exceeds eighty arpents in length, that it varies slightly from the course of the original survey, and that the superficial quantity of the entire tract, as ascertained by the surveyors appointed by the court, exceeds that which the instructions of the government to its deputies are said to authorize. It is also true that, although the surveyors appointed by the court found the upper and rear lines of the plaintiff's land, as they actually exist on the ground and as they were traced by them, to be the lines run by the United States surveyor, still their measurements do not exactly correspond with those of the United States survey, as represented in the township map, and consequently the superficial quantities of the two surveys differ. We do not deem it material to enquire which of the surveys is erroneous, as these discrepancies can in no wise affect the decision of the cause. The actual lines of the United States survey have been determined. Those lines were intended to reestablish the original lines and boundaries of the plaintiff's tract, and correspond with his possession, and the claim he now asserts. Notwithstanding the deviation in the course of the upper line, and the excess in the quantity of the tract, the survey of the township has been approved, and the United States have permitted the plaintiff to hold the excess, whatever it be, as an integral part of his tract. The same survey determined the lines of the defendant, and was the guide of the government in disposing of the lands which were subsequently purchased by the vendors of the defendant, so that no conflict between the lines of the parties does or can occur.

If it be true that the excess of the plaintiff's tract is greater than that authorized by the regulations of the land department, the error can only be corrected by the government. The defendant cannot be permitted to go upon any portion of the land within the plaintiff's boundaries which he may think fit, and take possession of this excess, on the ground that the plaintiff is without title to it. The government permits the plaintiff to hold this excess, and the court did not, in our opinion, err in requiring the defendant to surrender that portion of the land in his possession, which is included within the plaintiff's line.

The next question at issue between the parties is, the servitude of drainage. It appears that two bayous or natural drains pass through the plantation of the plaintiff, and, running towards the rear, traverse the land of the defendant. These drains have been intersected by a canal, which receives their waters, and conveys them to swamps in another direction, and the channels of the bayous

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have been filled up by embankments of earth and other obstructions, leaving no other passage for the water than the canal.

As the proprietor of the lower estate, the defendant owes the servitude of drainage to the plaintiff, and is not permitted to impede the natural flow of the water, nor to divert its course. C. C. arts. 656, 657. He contends that the canal affords as free a passage for the waters, as the bayous which he has closed; but this position is not supported by the testimony. It is, on the contrary, shewn that the canal is not capable of discharging so large a volume of water as the two bayous, and that the drainage of the plaintiff has been injured by the obstructions thrown across the streams. The alleged assent of the front proprietor to the construction of the embankments across the bayous, is also repelled by the testimony. The front proprietor distinctly objected to the works, although, at that time, no measures were taken to arrest them, or to cause the obstructions to be removed. The court did not, in our opinion, err in maintaining his claim for their removal.

The third issue presented is the right of way. The defendant has not, in his answer, based his right to the servitude claimed, on the ground that his estate is enclosed, and that from its position he can legally claim a passage over the plaintiff's land to the public road or the river, nor does such appear to be the fact, from the evidence before us. It has nevertheless been assumed by the defendant's counsel in argument to be true. The defendant, in his pleadings, rests his claim on the alleged consent of the plaintiff's vendor that the right of passage should be exercised over his land, and contends that, the place having been fixed where the road should pass, it can no longer be changed, unless it may be for the reasons for which such changes are permitted by law. The evidence in relation to the alleged grant of the servitude by the plaintiff is that, about ten years since, *Botts*, the former proprietor of the lands now owned by the defendant, with the permission of the plaintiff's vendor, repaired and made passable a lane between the plaintiff and his adjoining proprietor, and that *Botts*, and those holding under him, have been permitted to use it from that time until the commencement of this suit. *Botts* applied to the plaintiff's vendor for a right of way through this lane, which the evidence shows was positively refused. The front proprietor appears to have granted the temporary use of the road only, but declined recognizing an absolute right of passage. This permission cannot be considered as a grant of the servitude of way, or as an acknowledgment that a passage was due over the land now owned by the plaintiff.

If it be assumed that the defendant's estate is so enclosed as to entitle him by law to a passage to the public road, still the evidence in the record is not such as would authorize us to decree to him the exercise of the right over the land of the plaintiff. The facts necessary to determine the controversy on that hypothesis are not disclosed.

The 696th article of the Code provides that: "The owner of the estate which is surrounded by other lands has no right to exact the passage from which of his neighbors he chooses. The passage shall be generally taken on the side where the distance is the shortest from the enclosed estate to the public road. Nevertheless, it shall be fixed at the place least injurious to the person on whose estate the passage is granted." The 695th article provides that the proprietor who claims a passage shall pay an indemnity for the right.

Now, conceding that the defendant is cut off from access to the public road or river, by surrounding proprietors, we are not informed by the evidence from which of his neighbors the right of passage may be legally exacted. It is not

shown over whose land the shortest way may be obtained, and with the least injury to the party who may be required to submit to the servitude, nor what indemnity should be paid. *Broussard v. Etié*, 11 La. 399. It may well be that the passage is not due by the plaintiff, but by another neighbor. The district judge did not, in our opinion, err in maintaining the plaintiff's right to forbid the further use of this road by the defendant. But as the terms of the judgment may be considered as concluding the defendant from hereafter claiming a way upon different grounds, it must be amended by reserving his rights in this respect.

It is, therefore, ordered that the judgment of the District Court be amended by reserving to the defendant the right to institute further proceedings to determine his right to a way over the land of the plaintiff, and, thus amended, that it be affirmed; the appellee paying the costs of this appeal, and the appellant that of the court below.

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JUDSON, Administrator v. CONNOLLY.

An action to recover immovable property is a real action, and not affected by the prescription of ten years established by art. 3508 C. C. Nor does that prescription apply to judgments.

The administrator of an insolvent succession represents the creditors, and not the deceased; and he may maintain an action for the benefit of the creditors, which the deceased, were he alive, could not do for his own advantage.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hoffman and Halsey*, for the plaintiff. *Preston*, for the appellant. The judgment of the court (*Slidell J.* not sitting,) was pronounced by

ROST, J. This suit is a sequel to that of *Bridget Connolly et al. v. Sarah Connolly* and husband, lately decided. The administrator of the insolvent succession of the late *Felix Connolly*, relying on the judicial declarations of the plaintiffs in that suit that the property adjudged to *Bridget Connolly* belonged to the said succession, and was held by *Sarah Connolly* under a simulated sale, now asks that *Bridget Connolly* be cited, and that said property be decreed to belong to the succession he represents. There was judgment by default, which, upon proof of the facts alleged in the petition, was made final, and the defendant appealed.

The opinion we have formed on the merits, renders it unnecessary to notice the bills of exception found in the record. The defendant has filed in this court several pleas of prescription, and the plaintiff waives his right to have the case remanded, under art. 902 C. P.

1st. It is alleged that this is a personal action; that more than ten years have elapsed since *Sarah Connolly* received from the syndic of *Hoskins* a title to the property claimed, and that under art. 3508 C. C. the action is prescribed. 2d. It is further alleged that the debts due by the succession of *Felix Connolly* are evidenced by judgments rendered more than ten years before the institution of this suit, and that they are also prescribed under the same article of the Code. We have also been referred to an act passed in 1848, on the subject of prescription, providing that the time required for it shall not be affected by absence from the State.

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CONNOLLY.

The prayer of the petition is, that the immovable property therein described be decreed to belong to the succession of *Felix Connolly*, and that it be delivered to its administrator. This is clearly a real action, unaffected by the prescription of ten years.

Art. 3508 provides that all personal actions, except those previously enumerated in the Code, are prescribed by ten years. But a judgment is not a personal action, and does not come within the rule. The debts proved are still due, and must be satisfied out of the property of *Felix Connolly*, if he had any at the time of his death. That the property claimed belonged to him is proved by the judicial declarations of the defendant in the former case, which are in evidence. There is nothing in the judgment of the court in that case tending to falsify those declarations; on the contrary, it enforces a compromise entered into between the parties to the suit, as heirs of *Felix Connolly*, in relation to the property left by him, and, with the consent of the other heirs, adjudged to the defendant in full ownership that portion of it which is now claimed. The defendant received it in right of *Felix Connolly*, and her title to it is by inheritance. She cannot therefore be viewed as a third person, and the prescriptions of one, five, and ten years which she has pleaded, under arts. 1989, 3507, 3442, 3437, C. C. can no more avail her, than they would avail *Felix Connolly*, if he was alive.

The plea that the action of the plaintiff to annul the sale cannot be maintained, because if there was fraud, *Felix Connolly* was a party to it, and as he would have no action himself, he could transmit none to his representatives; assumes that the plaintiff represents the deceased. It is not so; the succession is insolvent, and the administrator represents the creditors.

The case of *Gravier's curator v. Carthy's executor*, is not applicable to this controversy.

Judgment affirmed.

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BOYLE v. MANN.

All acts or hindrances—*voies de fait et empêchemens*, coming from the debtor, which deprive the creditor of the remedy and forum contemplated at the time of the contract, suspend prescription.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* *H. D. Ogden* and *Mott*, for the appellant. *Conklin*, for the defendant. The judgment of the court was pronounced by

ROST, J. This action was commenced by attachment, in August, 1847, on a promissory note, which had been due more than five years at the time. The plea of prescription, under art. 3505 of the Code, presents the only question in the cause. The plea was maintained in the first instance, and the plaintiff appealed.

In January, 1837, the defendant was a member of the commercial firm of *W. L. & W. Mann*, trading in Franklin, in the State of Mississippi. His brother and partner subscribed the note sued on in the name of the firm, on the 6th January of that year. It was payable six months after date. *W. L. Mann* was killed before the maturity of the note. The defendant took charge of his assets, and, in the words of one of the witnesses, "paid as long as he had available means, and finally abandoned all in despair." In 1840, he removed from

Mississippi to Texas, which was then a foreign country, and thence to Mexico, in 1847.

We consider this a proper case for the application of the rule *Contra non valentem*. All acts or hindrances—*voies de fait et empêchemens*, coming from the debtor, which deprive the creditor of the remedy and forum contemplated at the time of the contract, suspend prescription. 2 Troplong, Prescription, 725. The Commercial Code of France establishes, for bills of exchange, a prescription similar to that which is here pleaded. It has been held there that this prescription cannot be opposed by the drawer of a bill, who, before the expiration of the five years, obtained it confidentially from the holder, and wrongfully kept it beyond the time at which prescription would have accrued. 2 Troplong, *loco citato*. And again, after the drawer of a bill of exchange has failed, and the bill has been placed by the holder in the hands of the syndic, if the syndic fails or refuses to return it, the prescription of five years is suspended from the day of such failure or refusal. Dalloz, 1845, 1st part, p. 29.

The disappearance of the defendant, and his removal to a foreign country, was also an *empêchement* by which the plaintiff was deprived of his remedy; and that his intention in removing was to defeat the claim of the plaintiff and of his other creditors, is proved by his declarations to the plaintiff's agent, that he had left behind him many debts which he never intended to pay, and that if this was one of them he would class it with the others, and never pay it. In this resolve we cannot assist him.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the plaintiff for the sum of \$302 75, with interest at the rate of ten per cent per annum from the 9th July, 1837, till paid, and costs in both courts. It is further ordered that the property attached be sold to satisfy this judgment.

SPILLER v. DAVIDSON.

The prescription of five years, C. C. 3505, does not apply to a note not negotiable. Such a note is prescribed by ten years. C. C. 3508.

APPEAL from the District Court of Livingston, Lawson, J. Watterston, for the plaintiff. W. D. Hennen, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff alleges that, in 1839, he placed a note in the hands of the defendant for collection, and that the defendant has made no effort whatever to obtain a judgment, but has permitted it to become extinguished by prescription; that he has retained the note in his possession and has transferred it for his own benefit; and by his professional neglect and misconduct has made himself liable for its amount. The defendant pleaded the general issue. He also pleaded that the plaintiff had failed to furnish the evidence necessary to establish the validity of the note; that he had offered to return the note; and has always held it subject to the plaintiff's order. He deposited the note with the clerk of the court at the time of filing his answer.

The note is dated, in October, 1833, is payable at twelve months, and is not

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negotiable in its form, being a promise to pay to *Isaac B. Shipler*. It purports to be signed by the mark of the maker, *Amelia Gordon*.

As the instrument was not negotiable, it was not subject to the prescription of five, but of ten years. It is, therefore, not yet prescribed. *Whiting v. Prentice*, 12 Rob. 141, &c. The judgment of the court below based upon the supposed extinction of the note is, therefore, erroneous.

In an action of this sort it is incumbent on the plaintiff to show that he had a valid claim, which has been impaired or lost by the negligence or misconduct of the attorney. The evidence does not establish the existence now, or at any time, of a valid claim in favor of the plaintiff against *Amelia Gordon* or her succession.

It is, therefore, decreed that, the judgment of the court below be reversed, and that there be judgment for the defendant, with costs in both courts.

HEREFORD v. THE POLICE JURY OF WEST BATON ROUGE.

Article 3411 C. C. applies to the abandonment of the possession of moveables only. An abandonment of the title to land must be made in writing.

Where a road and levée ordered by the police jury to be constructed on a tract of land is adjudicated to the proprietor of the land for a certain sum, who complies with the terms of the adjudication, being himself, as proprietor of the land, the first party bound to pay the amount of the adjudication, his claim will be extinguished by confusion.

APPEAL from the District Court of West Feliciana, *Penn. J. Elam*, for the plaintiff. *Brunot and Bennett*, for the appellants. The judgment of the court was pronounced by

ROST, J. The plaintiff alleges that he was the owner of a tract of land, having ten arpents front on the river Mississippi; that, after the high water of 1844, it became necessary to construct thereon a new levée, which, in conformity with the general regulations then in force, was to be placed at least one arpent from the bank of the river, which levée the petitioner held himself ready and willing to construct whenever directed to do so; that the police jury conceiving that the levée should be placed at more than one arpent from the bank of the river, appointed commissioners to examine the premises, and fix the direction as well as the dimension and probable cost thereof, and as nearly as possible the amount of damages which the petitioner might sustain by the construction of the levée; that the commissioners in their report recommended that a new levée should be constructed at a distance of five arpents from the bank of the river, without making any mention of the damage which the petitioner might sustain thereby, which report was adopted by the police jury and the construction of the levée ordered; that the petitioner notified the inspector to proceed in the manner pointed out by law to ascertain the damage, which he refused to do, and that the said inspector advertized to the lowest bidder the making of the road and levée; that the petitioner attended in person on the day fixed for the adjudication, and when the sum of \$15,000 was bid, he determined to abandon to the parish his tract of land, and, to avoid the ruinous consequences that might ensue, claimed the right to become a bidder, and thereupon bid the sum of \$14,500, which bid was accepted and no

one bidding a less sum, the constrution of the road and levée was adjudicated to him, and the inspector exacted a bond and surety, which were furnished; that the petitioner faithfully complied with the terms of the adjudication, and that the road and levée made by him were accepted by the inspector, and his bond cancelled and returned to him; that, after the completion and reception of the road and levée, the petitioner made known to the police jury that, in consequence of the placing of the levée five arpents from the bank of the river, he had been damaged in the sum of \$6,000, which he requested them to pay, or otherwise to adopt some resolution for referring his claim to an amicable adjustment, all of which they refused to do; whereupon they were more formally notified of the abandonment of the land to them and of the intention of the petitioner to claim the full benefit of his contract, and demand payment of the sum of \$14,500; and also of his readiness to make a transfer in an authentic form of the land. The prayer is that judgment be rendered in favor of the petitioner for \$14,500, and that the police jury be condemned to accept a title to the land, or that otherwise the petitioner may have judgment for \$6,000, the damages sustained by him on account of the unauthorized location of the levée.

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The answer specially denies the existence of any law authorizing the claim for damages set up by the plaintiff, and contains further a general denial.

On the application of the plaintiff the venue was changed, and the case tried before a jury of West Feliciana. At the trial the plaintiff discontinued his claim for damages, and the jury having returned a verdict in his favor for \$14,500, the defendants have appealed from the judgment rendered thereon.

This case is free from difficulty. It is unnecessary to determine whether the plaintiff could abandon the land, no legal abandonment having been shown, and the fact that it was made being inconsistent with the claim of damages set up in the petition. The plaintiff's counsel contends that the law requires no particular form as the evidence of an abandonment, and that it is enough to do some act which manifests the intention of abandoning the possession. C. C. art. 3411, to which he refers us, applies to the abandonment of the possession of moveables only. An abandonment of the title to land must of course be made in writing.

The adjudication has not changed the rights and obligations of the parties to this controversy. The plaintiff stands precisely as he would stand, if he had made the levée when he was directed to do so by the inspector. He would be the first party bound to pay the amount of the adjudication if it had been made to another, and, being at the same time debtor and creditor, his claim is extinguished by confusion.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendants, with costs in both courts.

WATTERSTON v. WEBB, Administrator.

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Article 2423 C. C. which prohibits attorneys from purchasing litigious rights which fall within the jurisdiction of the courts before which they practice, under the penalty of nullity, and the payment of all costs, damages and interest, is imperative; and the fact that the attorney had no connection with the litigation, and that the purchase appears to have been fair, cannot exempt the purchaser from the operation of that article.

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v.
WEBB.

APPEAL from the District Court of St. Helena, Penn. J. *Watterston*, appellant, *pro se.* *Bullard* and *Frost*, on the same side. *Merrick*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal from a judgment of the court of the Eighth Judicial District dismissing the plaintiff's petition, on the ground that his action could not be maintained because it was founded upon a litigious right purchased by him, he being an attorney at law practising in the court before which the right was to be enforced. The plaintiff has taken this appeal. It appears that a judgment was rendered in the late court of Probates of St. Helena against *Webb*, as administrator of the succession of *Stephenson*, from which an appeal was taken by *Webb* to this court. It was filed on the 10th February, 1846, and judgment was rendered on the 10th May, 1847. The judgment was in favor of the New Orleans Gas Light and Banking Company; and by an act of sale passed before a notary in New Orleans, on the 17th of February, 1847, pending the appeal, the plaintiff became the purchaser from the bank of this claim against the succession of *Stephenson*, together with a large number of other claims, many of which were considered desperate or doubtful. The plaintiff had no connection with the litigation between the bank and *Webb*, and the purchase appears to have been a fair one. Article 2422, which prohibits attorneys from purchasing litigious rights which fall within the jurisdiction of the courts before which they practice, under the penalty of nullity and the payment of all the costs, damages and interests, is imperative, and the district judge did not err in giving it effect.

Judgment affirmed.

KEMP, Tutrix v. NICHOLS.

No action can be maintained against a party for aiding a debtor in removing beyond the limits of the State slaves subject to a judicial mortgage in favor of plaintiff, where the evidence shows that the debtor possessed no other property, and that prior mortgages recorded against the debtor exceed the value of the slaves. *Per Curiam*: The plaintiff has sustained no injury, and can have no action; or if it be conceded that the plaintiff's *jus in re*, resulting from the general mortgage, is sufficient to authorize the action, the damages must be merely nominal.

APPEAL from the District Court of Concordia, *Farrar*, J. *Thomas* and *Snyder*, for the appellant. *Stacy* and *Sparrow*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff is a judgment creditor of *Charles N. Rowley*. The judgment having been duly recorded operated as a general mortgage on the property of *Rowley*. The petition alleges that certain slaves therein named owned by *Rowley* and in his possession, though covered for fraudulent purposes under the name of *Jacob D. Lansing*, of the value of \$10,000, were removed from the State to parts unknown. It charges that the defendant, fully aware of the mortgage rights of the plaintiff upon the slaves and intending to defeat them, colluded with *Rowley*, and others to the petitioner unknown, and fraudulently aided in removing the slaves, he, the defendant, well knowing the utter insolvency of *Rowley*, and thus accomplishing their purpose of defeating the mortgage. It further states that, after exhausting all the property of *Rowley* known to the petitioner, a large balance of the judgment remains due and unpaid, and that she has sustained damage to the amount of the value of the slaves, by the illegal,

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unjust, and fraudulent acts of the defendant in the premises. She prays judgment for \$10,000, the amount of the alleged damage, and for general relief.

The defence to this action is, an alleged *bond fide* purchase of the slaves by the defendant from *Charles N. Rowley*, as the attorney in fact of *Samuel Rowley*, by act under private signature, dated the 31st July, 1847, for a just price, he, the purchaser, believing that the slaves belonged to said *Samuel Rowley*. There was a verdict for the defendant, and judgment having been rendered in conformity therewith, the plaintiff has appealed.

In addition to the general defence resting on the *bond fides* and the validity of the purchase of the slaves by the defendant, a point was made and has been argued before us, that there were other judicial mortgages against *Rowley's* property having precedence over that of the plaintiff, and that the plaintiff has no sufficient interest in the slaves to support the present action for damages against the defendant. It appears that the judicial mortgages recorded against *Rowley* exceed the sum alleged to be the value of the slaves; the petition states that his property has been exhausted, and it follows that these slaves, eight in number, alone remain to satisfy the prior judgments against him. The judicial mortgage gave a right to the plaintiff over the property of the debtor for the security of her debt, with the power of having it seized and sold in default of payment. The existence of a judicial mortgage on property does not, in any sense, affect the validity of the disposal of it by a contract of sale. The owner may sell it, and the purchaser takes it subject to the mortgage. It may be sold under execution, the mortgage still subsisting in the hands of the purchaser.

The injury complained of by the plaintiff is the collusion of the defendant with *Rowley* and others, in removing the slaves from the State and thereby defeating her mortgage. She having neither the ownership nor the possession of the slaves, if her action be based upon the 2294th article of the Code, which provides that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair, it is then incumbent on us to ascertain what damage the plaintiff has suffered by the acts of the defendant in thus aiding in removing the slaves. The petition assumes that the measure of the responsibility of the defendant is the value of the slaves. Let us suppose then that the slaves are returned, and sold under execution, and the proceeds in court for distribution. The plaintiff can have no portion of them; they must be applied to the satisfaction of the previous judgments, and thus it seems to us that the plaintiff stands before us without interest to maintain the present suit. She has sustained no injury, and can have no action. Or, if it be conceded that the plaintiff's *jus in re*, resulting from the general mortgage, is sufficient to authorize the action, the damages must be merely nominal, and below in amount the jurisdiction of the court of the first instance.

The right of the plaintiff to maintain this action is placed upon the same footing by the argument of counsel, as that of the creditor to set aside a fraudulent conveyance made by his debtor. The cases are similar in principle, but the objection taken to the present action is provided for expressly in the revocatory action and removed. The judgment in that action, in avoiding the fraudulent contract, applies the property conveyed by it, or its value, to the payment of the plaintiff's debt. Civil Code, 1972. We think the provisions of law concerning the revocatory action are in conformity with the views we have expressed concerning the plaintiff's right of action in the case as presented to us, in thus creating a definite interest in the creditor in the result of the litigation which is thus made to inure to his benefit.

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NICHOLS.

The district judge was of opinion that the judicial mortgages recorded against *Charles N. Rowley*, for an amount exceeding the value of the slaves and having precedence of the plaintiff's mortgage, did not affect her right to recover in this action, and so charged the jury, who found a general verdict for the defendant. The evidence satisfies us that the slaves, at the time of the alleged purchase by the defendant from *Charles N. Rowley*, as the attorney in fact of *Samuel Rowley*, were the property of *Charles N. Rowley*, and not of *Samuel Rowley*, and that the names in which the titles were placed of *Jacob D. Lansing* and *Samuel Rowley*, were used by *Charles N. Rowley* for his exclusive benefit, for the purpose of screening the slaves from his creditors. We do not find that the relations of *Lansing* and *Samuel Rowley* and *Charles N. Rowley*, in respect to these slaves, differ materially from those established in the case of *Rowley v. Kemp*, 2 Ann. 362, and *Farrar v. Rowley*, Ib. 478.

As to the privity of *Nichols* to the mode of operating of *Charles N. Rowley* which his transactions, which have been the subject of judicial investigation, have disclosed, his position and relations with the latter leave no doubt on our minds, and we do not concur with the jury as to the *bona fides* of the defendant in his alleged purchase of the slaves. Although averse to the reversal of verdicts of juries on questions of fact in cases of this kind, we should have felt ourselves obliged to have set aside this verdict and have ordered a new trial, had the plaintiff made out a sufficient cause of action. As the case stands before us, the only judgment we can render is that of non-suit.

It is, therefore, ordered that the judgment of the District Court be reversed, and that judgment be rendered against the plaintiff as in case of non-suit, with costs in the District Court; the defendant paying those of this appeal.

DUNBAR v. MANSKER.

Decision in *McDonogh v. Dutillet*, 3 An. R. 660, affirmed.

APPEAL from the District Court of East Baton Rouge, *Burk, J. Paterson* and *Brewer*, for the appellant. *Elam*, for the defendant. The judgment of the court was pronounced by

KING, J. This cause was tried in the court below in the absence of the plaintiff and of his counsel, and a final judgment rendered in favor of the defendant on the merits, from which the plaintiff has appealed.

The defendant pleads no demand in reconvention. His answer is an admission of his signature, and a general denial of his liability. We have recently held that in such cases the only judgment which can be rendered on the failure of the plaintiff to appear and prosecute his demand, is one as in case of non-suit. *McDonogh v. Dutillet*, 3 An. 660.

The judgment of the District Court is, therefore, reversed, and a judgment rendered against the plaintiff as in case of non-suit; the plaintiff paying the costs of the court below, and the defendant those of this appeal.

THE STATE *v.* MORRIS.

The exculpatory oath authorized by sec. 17 of the stat. of 7 June, 1806, to be taken by a party prosecuted under that statute for the cruel treatment of a slave, in the absence of any witness, is not conclusive of the innocence of the accused, but must be received and weighed as other evidence, and may be rebutted.

A PPEAL from the District Court of St. Helena, *Penn. J. Elmore*, Attorney General, for the State. *Halsey, Ellis and Haynes*, for the appellant. The judgment of the court was pronounced by

KING, J. The appellant was prosecuted for the cruel treatment of his slave, under the act of 7th June, 1806. *Bul. & Curry's Dig.* p. 61, § 16, 17. No person having been present when the alleged cruel punishment was inflicted, the defendant tendered on the trial his own affidavit in exculpation, which was received. The judge, however, instructed the jury that it was not conclusive of the appellant's innocence, but was to be received and weighed as other evidence, and might be rebutted. To this charge a bill of exceptions was taken. The accused was convicted and sentenced, and has appealed.

The section of the law under which the defendant's affidavit was received is as follows: "If any slave be mutilated, beaten, or ill treated, contrary to the true intent and meaning of this act, when no one shall be present, in such case the owner, or other person having the charge or management, of said slave thus mutilated, shall be deemed responsible and guilty of the said offence, and shall be prosecuted without further evidence, unless the said owner, or other person, so as aforesaid, can prove the contrary by means of good and sufficient evidence, or can clear himself by his own oath." It is contended that the oath authorized by this section not only repels the presumption of guilt created by the statute, but is to be taken as conclusive of the defendant's innocence. Such does not appear to us to be a just interpretation of the act. The law creates a presumption of the master's guilt, which, in the absence of this express legislation, would not arise. It is founded upon the relation of master and slave, and the power of the former to maltreat the latter secretly and without the possibility, in many instances, of otherwise establishing his guilt.

He is consequently held answerable for the cruel treatment received by his slave while under his charge, and when no person is present, and is presumed to be guilty of the offence, "unless" in the words of the act, "he can prove the contrary." The burthen of proof in such cases is thrown on the accused, who is required to establish his innocence, and for this purpose is permitted to use his own affidavit, in addition to the testimony which is receivable in ordinary prosecutions. The statute has not said that this oath is to be conclusive, or of higher dignity than other evidence; nor do its terms authorize the conclusion that such was the intention of the law-giver. The obvious meaning of the expressions, "unless he can clear himself by his own oath," is that the defendant's affidavit shall be admissible; and, if believed, that its disclosures shall be such as to establish his innocence.

It has been correctly urged by the Attorney General, that the interpretation contended for by the defendant would enable the master to escape punishment by interposing his oath, when his guilt could be satisfactorily established by other

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testimony, which could not have been contemplated by the legislature. He may have previously confessed his guilt, or it may be established by circumstantial testimony, which is often as conclusive as positive and direct evidence; or the facts disclosed by the affidavit itself may bring the jury to a different conclusion from the defendant in relation to the cruelty of the punishment. In such cases the legislature could not have intended that the owner should escape punishment by interposing his own oath; or that the jury should acquit, notwithstanding their convictions, from the testimony, of the guilt of the accused. No greater weight is to be given to the oath of the accused in such cases than to other testimony, and the judge did not, in our opinion, err in his instructions to the jury.

Judgment affirmed.

JOHNSON et al. v. IMBODEN.

One with whom slaves, belonging to a succession opened in another State, were deposited for safe-keeping in that State, by whose laws they are personal property, and from whose possession they have been fraudulently and forcibly taken, and brought to this State and sold, has such a qualified property in them as will enable him to maintain an action for their possession against the purchaser; but he cannot recover the value of their hire while in possession of the defendant; for that he is answerable to the succession to which they belonged.

APPEAL from the District Court of Carroll, *Selby, J.* *Thomas*, for the plaintiffs. *Short and Blackburn*, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiffs were the sureties of *Samuel Campbell* on his bond given in the State of Arkansas, as executor of the last will of *Duncan G. Campbell*, deceased. The plaintiffs it appears, having reason to be alarmed at the mismanagement of the executor of the affairs of the succession entrusted to him; and the Court of Probates under which he held his authority having taken cognizance of the application of said plaintiffs to be released from their suretyship, decreed that *Campbell* should furnish other security. It further appears that, in order to quiet the apprehensions of the plaintiffs, and before any new security was given by *Campbell*, he deposited with them for safe keeping, to await the further action of the Court of Probates, certain slaves belonging to the succession. It is alleged that afterwards *Campbell* fraudulently and forcibly took from the possession of the plaintiffs the slaves thus deposited, and brought them to this State, where he fraudulently transferred them to *Imboden*, who has them in his possession. The plaintiffs brought the present suit against *Imboden* for the possession of the slaves, and had them sequestered. A verdict of a jury was rendered in favor of the plaintiffs for two of the slaves *Alice* and *Vincy*, and for \$208 for their hire. From the judgment rendered on this verdict the defendant has appealed.

The occurrences which gave rise to this suit took place in the county of Chicot, adjoining the northern boundary of this State.

The argument presented for the defence, relates to the want of any legal right to maintain this suit, on the part of the plaintiffs. But it appears to us that this right is unquestionable. The slaves being in the possession of the plaintiffs in the

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State of Arkansas, where the succession is still open and its affairs unsettled, and having been delivered to them by *Campbell* for safe-keeping to await the action of the Court of Probates, it seems to us that their right of possession cannot be drawn in question by a mere spoliator. *Campbell's* rights as a legatee gave him no right to remove the slaves to this State, and to dispose of them to the detriment of the succession which he was charged to administer. The other slaves brought to this State by *Campbell* have found their way across the line to Arkansas, and, in permitting the depositaries to maintain this action, we are only in fact returning those slaves to the action of the forum, from which they were removed for purposes which no court can justify. Slaves being moveables by the laws of Arkansas, the plaintiffs have such a qualified property in them as will support this action against a party in the position of the defendant. The judgment being for the possession of the slaves we consider that part of it, which secures the possession to the plaintiffs as correct; but for their hire the defendant will be responsible to the succession to which the slaves belonged.

The judgment of the District Court decreeing the defendant to pay the plaintiffs the sum of \$208, or, as it is written, two thousand and eight dollars, is therefore reversed; and that declaring the possession of the slaves *Alice* and *Viney* to the plaintiffs is affirmed; the defendant paying the costs of the District Court, and the plaintiffs those of this appeal.

HALLIMAN et al. v. CLARK et al.

In an action on an obligation in favor of a partnership, all the partners must join to enforce its performance. If one of the partners be absent, he may be represented by a curator *ad hoc*.

APPEAL from the District Court of Madison, *Selby, J. Amonett*, for the plaintiffs. *Stockton and Steele*, for the appellants. 1. An obligation in favor of a firm, or several persons jointly, cannot be sued for by any one member of the firm or payees, but the action must be instituted by all the members or payees; and a judgment rendered in their joint name or firm, at the suit of any one or any part of them, would be no bar to a suit by the whole firm for the same cause, or of the other partners for their shares. *Tucker v. Lile*, 4 La. 328. 10 La. 432. 13 La. 484. 16 La. 31. 9 Rob. 149. The judgment of the court was pronounced by

KING, J. *Clark* executed an obligation in favor of *McReynolds, Halliman & Co.*, a firm composed of *McReynolds, Halliman* and *Riley*, for the payment of the price of constructing a levee, and the defendant *Downes* became the guarantor of *Clark* for the performance of the obligation. Upon this contract *Halliman* and the administrator of *McReynolds* instituted the present action to enforce payment. The defendants excepted to the petition for the want of proper parties, averring that *Riley* should have been joined in the action. An amended petition was thereupon filed, setting forth that *Riley* was a partner of the firm of *McReynolds, Halliman & Co.*, and making him a party plaintiff. The defendants then pleaded to the merits. On the trial the attorney of the plaintiffs was examined as a witness. He deposed that he had never seen *Riley*, or been authorized by him to join him as a party plaintiff in the suit. That the amended petition was presented in con-

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CLARK.

sequence of the exception filed by the defendants, that the object of the witness was to collect the sum due for the use of *Halliman*, who was the holder, and, as he believed, the exclusive owner of the demand. The district judge instructed the jury that the plaintiffs were properly before the court, and a bill of exceptions was taken to that part of his charge. There was a verdict in favor of the plaintiffs, and, after an ineffectual effort to obtain a new trial, the defendants appealed.

The district judge, in our opinion, erred in his instructions to the jury. It has been repeatedly held that, when the obligation is in favor of a firm, all the partners must join in the action to enforce its performance. *Crozier v. Hodge*, 3 La. 357. *Cutler v. Cochran*, 13 La. 484. *Flower v. O'Connor*, 7 La. 196.

As the plaintiffs however are not without remedy, but may still make *Riley* a party, by causing him to be represented by a curator *ad hoc*, we will remand the cause, which justice appears to us to require.

The judgment of the District Court is therefore reversed, and the cause remanded to be proceeded with according to law, the appellees paying the costs of this appeal.

BROWN v. THE POLICE JURY OF MADISON.

No action will lie against a police jury representing a parish, for the amount of an adjudication, under the stat. of 7 February, 1829, for the construction of a levée in front of land belonging to an absentee, until the plaintiff has exhausted his remedy against the land. Where in an action against a police jury the tax payers of the parties to be affected, they will not be held to allegations in pleading made in error by their agents.

APPEAL from the District Court of Madison, *Selby, J. Thomas and Snyder*, for the plaintiff. *Hynes, Stacy and Sparrow*, for the appellants. The judgment of the court was pronounced by

ROST, J. The plaintiff has instituted this action to recover from the defendants the amount of an adjudication made to him, under the act of 1829, for the construction of a levée in front of a tract of land belonging to non-residents. The adjudication, the construction of the levée, and its acceptance by the inspector, are admitted, as alleged; but the defendants contend that the action is premature. There was judgment against them, and they appealed.

The only question of law which the case presents is, whether the plaintiff was bound to discuss the land upon which the levée was made before he could proceed against the parish.

The appellee maintains that the privilege granted by the act of 1829, to parties who have undertaken the making of a levée is but an accessory to the principal obligation, and that the party in whose favor this stipulation is made may, or may not, avail himself of it.

It has never been considered by our predecessors or ourselves, that adjudications under the act of 1829, created a direct obligation against the parish. The decisions heretofore made seem to consider the police jury in the light of a surety, not of a principal debtor. The act of 1829, under which the plaintiff claims, makes the land directly liable to him, and in our opinion establishes his first remedy under the adjudication. Had this remedy been resorted to, it is in evidence that, under an ordinance of the defendants, the land would have been purchased by

4	180
44	300
4	180
107	418

them for a sum sufficient to pay the plaintiff, and the privilege which he has, would thus have inured to their benefit. We think they cannot be deprived of this right. Browne
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POLICE JURY.

It is urged that the defendants have alleged in their answer that, the remedies secured to the plaintiff by law were lost in consequence of the acts and omissions of their officer, and that, under this judicial admission, the plaintiff could proceed directly against the parish, as was done in the case of *Newcomb v. Police Jury, &c.*, 4 Rob. 233.

The defence of the police jury was perhaps ill advised. But the plaintiff has proved that it was unfounded, and that all the formalities required had been complied with. Considering that the police jury are nominal defendants, and that it is the tax payers of the parish who are to be affected by our decision, we cannot hold them to allegations made in error by their agents. *Millaudon v. First Municipality*, 1 An. 215.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment against the plaintiff as in case of non suit. It is further ordered that, the plaintiff pay the costs in both courts.

NEELY v. THE POLICE JURY OF TENSAS.

A claim for work done to a public levée, under the provisions of the stat. of 28 April, 1847, relative to the parish of Tensas, may be recovered in an action against the police jury of the parish, unless it be shown that they had provided the specific fund which that act, (s. 5,) makes it their duty to raise, and a satisfactory reason be given for their failure to pay the plaintiff out of it.

APPPEAL from the District Court of Tensas, *Selby, J. Montgomery and Frost*, for the plaintiff. *E. D. Farrar*, for the appellants. The judgment of the court was pronounced by

ROST, J. This is a suit based upon an account for work done to a public levée in the parish of Tensas, under the provisions of an act relative to roads and levées in the parish of Tensas, approved the 28th April, 1847. The answer admits the correctness of the account, but avers that no action lies upon it against the parish. The plaintiff's claim was sustained in the first instance, and the defendants appealed.

The 5th section of the act of 1847, provides that a special levée fund shall be formed by the imposition of a tax upon land and out of the proceeds of certain fines and forfeitures, and the 6th section ordains that each owner of slaves employed on the levées shall be entitled to draw from said fund the sum of one dollar for each day's work. The appellants insist that the only claim of the appellee is against that specific fund, and pray for a reversal of the judgment on that ground.

We are of opinion that they have failed to make out a proper case for our interference. They ought to have shown that they had provided the specific fund which the act of 1847 made it their duty to raise, and further they should have adduced satisfactory reasons for their failure to pay the plaintiff's claim out of it.

Judgment affirmed.

THE STATE v. DICK.

Art. 107 of the constitution which guaranties to every person accused a speedy public trial by an impartial jury of the vicinage, does not apply to slaves.

Slaves are treated as persons by the criminal law.

A slave may be punished for the murder of another slave, under sec. 11 of the stat. of 7 June, 1806, relating to slaves; or under ss. 1, 2, of the stat. of 7 June, 1806, on the subject of crimes and misdemeanors, nothing in this last act confining it to free persons.

Any objections to a tribunal organized under the stat. of 1 June, 1846, for the trial of a slave, on the ground that it does not appear that the slave owners who sat on the trial were selected by the justices of the peace, nor by either of them, nor that the persons who sat on the trial as slave owners, were slave holders of the parish, must be urged before the persons who sat on the trial are sworn, or they will be considered to have been waived.

A PPEAL from a special tribunal organized under the stat. of 1 June, 1846, for the trial of a slave, in the parish of St. Tammany. *Elmore*, Attorney General, for the State. *A. Hennen*, for the appellant. The judgment of the court (*Rost*, J. absent,) was pronounced by

KING, J. The defendant was convicted of the crime of murder alleged to have been committed upon the person of a slave, and has appealed from the sentence pronounced upon him. After the court, composed of two justices and ten owners of slaves, had been sworn and organized, the defendant, by his counsel, excepted to its jurisdiction, on the ground that the law creating the tribunal violated the constitution of the State, which guaranties to all persons an impartial trial by a jury of the vicinage; and that the only jury known to the constitution is one composed of twelve jurors, in the selection of whom the accused is entitled to the right of peremptory challenges. The plea was overruled, and a bill of exceptions taken to the opinion of the court.

The 109th article of the constitution of this State is relied on in support of this position. One of its clauses provides that, "the accused shall have a speedy public trial by an impartial jury of the vicinage." The same provision is found in the constitution of 1812 (art. 6, s. 18), and was taken from the constitution of the United States. Art. 3, s. 2, and Amendments, art. 8. At the time that the constitution of 1812 was adopted, the act of the 4th May, 1805 (sec. 33), introducing the common law method of trial, rules of evidence, and other proceedings in the prosecution of crimes, was in force. The 47th section of the act limited its operation to free persons, and declared that its provisions should not extend to slaves. There also existed a separate Code of laws declaring the offences of slaves, and creating a tribunal for the trial of offenders, composed of the county judge, and not less than three, nor more than five freeholders, in capital cases.

The tribunal provided by this act was several times modified by different acts of the legislature, commencing in 1825 and extending down to 1843; but no one of the amendments accorded to slaves a trial by jury in the sense in which that term is used in the constitution. See *Bul. & Cur. Dig.* pp. 57, s. 41; 99, s. 1. Acts of 1830, p. 146, § 8: Acts of 1843, p. 91. The article of the Civil Code of 1808 which declared that the rules for the police of slaves and the punishment of their crimes "are fixed by special laws," was also in force when the old constitution was adopted, and has since been incorporated into the Code of 1825. Art. 172.

Thus, from the commencement of our legislation, two distinct methods of trial¹

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have existed, one applying exclusively to free persons, granting them a trial by jury, and the other extending to slaves, to whom a jury has been denied. This distinction existed when the constitution of 1812 was adopted and continued down to 1845, notwithstanding the article which declared that "the accused shall have a speedy public trial by an impartial jury of the vicinage." The uniform interpretation given to that article, by the repeated legislative acts to which we have referred, and by the tribunals at different times created for the trial of slaves, has been, that it does not extend to that class of offenders. The corresponding provision of the constitution of 1845 was adopted with a full knowledge of the interpretation which it had received for more than thirty years, and we must presume that, in adopting the language of the old constitution, it was intended also to adopt the interpretation which it had previously received. See the cases of *McKee v. Ellis*, 2 An. 169, and *Colt v. O'Callaghan*, Ib. 190.

The act of 1846, under which the tribunal was organized for the trial of the defendant, in our opinion, stands in no conflict with the constitution. Under its provisions slaves are not entitled to peremptory challenges. They may challenge for cause, but the right must be exercised before the court is sworn. *State v. Isaac*, 3 An. 359.

The next position assumed is, that slaves are not treated as persons by our laws. That the statutes providing for the punishment of their crimes are all special, and none of them declare the killing of one slave by another to be murder. The repeated acts of the legislation declaring slaves capable of committing crimes, annexing punishments to their offences, and creating tribunals for the trial of the offenders, must be considered so many recognitions that they are persons. It is difficult to conceive how a crime can be committed by a slave, unless he be considered in law a person. But we are not left to inference on this point. The first section of the Black Code, speaks of slaves as persons. They are classed as persons in the Civil Code, in the title treating "*Of the Distinction of Persons*," and were so classed in the Code of 1808, p. 10, art. 13. They were also held to be persons by the late Court of Errors and Appeals in the case of the *State v. Moore*, 8 Rob. 521.

Considered as persons there are at least two statutes under which the offences charged against the accused may be punished. The first is, the 11th section of the Black Code (Bul. & Curry's Dig. p. 59); the second, the act of the 7th June, 1806 (Bul. & Curry's Dig. p. 251), annexing the punishment of death to the crime of murder. There is no clause in the act last referred to confining its operations to free persons.

It is next urged that it has not appeared that the two justices, or either of them, selected the ten slave owners to assist at the trial, nor that the persons who sat on the trial were slave owners of the parish. These objections were not made in the court below. The prisoner has the right to object to the want of qualification of the jurors, and to insist on the tribunal being organized as directed by law. But that objections must be urged before the tribunal is sworn, otherwise they will be considered to have been waived. *State v. Isaac*, 3 An. 359.

It has further been objected that, it does not appear that the persons were all sworn. We think that the objection is not sustained by the record.

Judgment affirmed.

THOMAS v. WETZLER.

Plaintiff, in an action commenced by attachment, will be entitled to a judgment by default, against an absconding debtor, where a copy of the citation and petition were left with the wife of the defendant at his residence. The appointment of a curator *ad hoc* is unnecessary in such a case.

APPEAL from the District Court of East Baton Rouge, *Burk, J.* In this case, which was commenced by attachment, a copy of the petition and citation were left with the wife of the defendant at his residence. It was proved that the defendant had absconded. The plaintiff appealed from a judgment refusing him permission to take a judgment by default, on the ground that an attorney should have been appointed to represent the defendant as an absentee.

Brunot, for the appellant. No counsel appeared for the defendant. The judgment of the court (*Rost, J.* absent,) was pronounced by

SLIDELL, J. Considering article 253 of the Code of Practice, and the opinion of the court in *Williams v. Kimball*, 8 Mart. N. S. 355, we think a judgment of default should have been allowed, and the plaintiff permitted to proceed without the appointment of an attorney *ad hoc*.

It is, therefore, decreed that the judgment of the court below be reversed, and that the cause be remanded for further proceedings according to law, and with instructions to the court below to permit the plaintiff to proceed, without the appointment of an attorney *ad hoc*; the costs of this appeal to be paid by the defendant.*

4b 184
46 479
4b 184
49 944

GARDNER v. SHIPLEY.

An overseer, employed by the year, may obtain a sequestration of the crop on which he has a privilege, on making the affidavit required by law, though the year have not expired for which he was hired and the amount of his salary be not yet due. C. P. 275, § 6. Stat. 7 April, 1826, s. 9. It is not essential that the debt should have matured before a party can resort to this conservative measure.

APPEAL from the District Court of East Baton Rouge, *Burk, J.* *Lacy*, for the appellant, relied on *Williams v. Duer*, 14 La. 537, *Nilson v. Pool*, 17 La. 212.

Herron, for the defendant. The action was premature. C. P. 14, 158. 3 La. 300. A sequestration cannot issue before the debt is due. It is urged that a sequestration is a conservative measure; so is attachment; but it was found necessary in order to give the right to attach before the debt falls due, to amend the law, and give such right in express terms. This has not been done as to sequestrations. 3 La. 300. 5 La. 345.

The judgment of the court (*Rost, J.* absent,) was pronounced by

SLIDELL, J. The plaintiff was employed, in January, 1848, by the defend-

* A similar judgment was pronounced, at the same time, in the case of *Medley et al.* against the same defendant. R.

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v.
SHIPLEY.

ant as his overseer, for the year ending on the 4th January, 1849. On the 7th December, 1848, he obtained a sequestration upon affidavit charging that the crop of the preceding year had been entirely removed, that a portion of the crop of the then present year had been shipped by the defendant, and that he was shipping and disposing of the balance as fast as it was made; that the plaintiff had just reason to fear and believe that, unless a writ of sequestration should be issued, the entire crop would be removed beyond the jurisdiction of the court, in all probability out of the State; that a sequestration was necessary to secure his privilege, &c. The affidavit also stated, among the reasons for the plaintiff's apprehension, that the defendant had refused to give him any security in case the property was removed.

The defendant excepted to the plaintiff's demand as being premature, and moved the court to set aside the sequestration, "for that the same could not issue until plaintiff's right of action had arisen." The court below, being of opinion that the suit was premature, sustained the exception, dissolved the sequestration, and dismissed the suit. From this decision the plaintiff has appealed.

By the sixth clause of the 275th article of the Code of Practice, it is declared that, "a creditor by special mortgage shall have the power of sequestrating the mortgaged property, when he apprehends it will be removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension." By the act of 1826 it was enacted that, in addition to the cases mentioned in article 275, the plaintiff may obtain a sequestration in all cases where he has a lien or privilege upon property.

The argument presented by the opposite party is, that the debt being unmatured could not be sued for, and the right to a sequestration being a mere accessory right must follow the fate of the principal. The text of the law does not require, in terms, that the debt secured by the mortgage, or privilege should have matured; and certainly its spirit is conservative, and, in our opinion, embraces the present case. The defendant forgets that, although it might be deemed part of the contract, that the plaintiff should not be paid until the end of the year, it was equally, by legal intendment, a part of the contract, that he should have the security of the crop for such payment. The intended removal of the entire crop would have been a breach of that contract; and the manifest object of the Code is to anticipate and prevent such an injury, when the party presents just grounds of apprehension. See *Neilson v. Pool*, 17 La. 212.

It is, therefore, decreed that the judgment of the court below be reversed, and that the cause be remanded for further proceedings according to law; the defendant paying the costs of this appeal.

MCCALOP v. HEREFORD.

A memorandum in writing, though signed on Sunday, is admissible in evidence to prove a contract made on another day.

APPEAL from the District Court of East Baton Rouge, *Burk, J. Lacey* and *Elam*, for the appellant. *Herron*, for the defendant. The judgment of the court (*Ros'*, J. absent,) was pronounced by

EUSTIS, C. J. This suit is brought to recover the balance due on a promissory note of the defendant, which the Union Bank had held, and which the plaintiff

THOMAS v. WETZLER.

Plaintiff, in an action commenced by attachment, will be entitled to a judgment by default, against an absconding debtor, where a copy of the citation and petition were left with the wife of the defendant at his residence. The appointment of a curator *ad hoc* is unnecessary in such a case.

APPEAL from the District Court of East Baton Rouge, *Burk, J.* In this case, which was commenced by attachment, a copy of the petition and citation were left with the wife of the defendant at his residence. It was proved that the defendant had absconded. The plaintiff appealed from a judgment refusing him permission to take a judgment by default, on the ground that an attorney should have been appointed to represent the defendant as an absentee.

Brunot, for the appellant. No counsel appeared for the defendant. The judgment of the court (*Rost, J.* absent,) was pronounced by

SLIDELL, J. Considering article 253 of the Code of Practice, and the opinion of the court in *Williams v. Kimball*, 8 Mart. N. S. 355, we think a judgment of default should have been allowed, and the plaintiff permitted to proceed without the appointment of an attorney *ad hoc*.

It is, therefore, decreed that the judgment of the court below be reversed, and that the cause be remanded for further proceedings according to law, and with instructions to the court below to permit the plaintiff to proceed, without the appointment of an attorney *ad hoc*; the costs of this appeal to be paid by the defendant.*

4b 184
46 479
4b 184
49 944

GARDNER v. SHIPLEY.

An overseer, employed by the year, may obtain a sequestration of the crop on which he has a privilege, on making the affidavit required by law, though the year have not expired for which he was hired and the amount of his salary be not yet due. C. P. 275, § 6. Stat. 7 April, 1826, s. 9. It is not essential that the debt should have matured before a party can resort to this conservative measure.

APPEAL from the District Court of East Baton Rouge, *Burk, J.* *Lacy*, for the appellant, relied on *Williams v. Duer*, 14 La. 537, *Neilson v. Pool*, 17 La. 212.

Herron, for the defendant. The action was premature. C. P. 14, 158. 3 La. 300. A sequestration cannot issue before the debt is due. It is urged that a sequestration is a conservative measure; so is attachment; but it was found necessary in order to give the right to attach before the debt falls due, to amend the law, and give such right in express terms. This has not been done as to sequestrations. 3 La. 300. 5 La. 345.

The judgment of the court (*Rost, J.* absent,) was pronounced by

SLIDELL, J. The plaintiff was employed, in January, 1848, by the defend-

* A similar judgment was pronounced, at the same time, in the case of *Medley et al.* against the same defendant. R.

GARDNER
v.
SHIPLEY.

ant as his overseer, for the year ending on the 4th January, 1849. On the 7th December, 1848, he obtained a sequestration upon affidavit charging that the crop of the preceding year had been entirely removed, that a portion of the crop of the then present year had been shipped by the defendant, and that he was shipping and disposing of the balance as fast as it was made; that the plaintiff had just reason to fear and believe that, unless a writ of sequestration should be issued, the entire crop would be removed beyond the jurisdiction of the court, in all probability out of the State; that a sequestration was necessary to secure his privilege, &c. The affidavit also stated, among the reasons for the plaintiff's apprehension, that the defendant had refused to give him any security in case the property was removed.

The defendant excepted to the plaintiff's demand as being premature, and moved the court to set aside the sequestration, "for that the same could not issue until plaintiff's right of action had arisen." The court below, being of opinion that the suit was premature, sustained the exception, dissolved the sequestration, and dismissed the suit. From this decision the plaintiff has appealed.

By the sixth clause of the 275th article of the Code of Practice, it is declared that, "a creditor by special mortgage shall have the power of sequestrating the mortgaged property, when he apprehends it will be removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension." By the act of 1826 it was enacted that, in addition to the cases mentioned in article 275, the plaintiff may obtain a sequestration in all cases where he has a lien or privilege upon property.

The argument presented by the opposite party is, that the debt being unmatured could not be sued for, and the right to a sequestration being a mere accessory right must follow the fate of the principal. The text of the law does not require, in terms, that the debt secured by the mortgage, or privilege should have matured; and certainly its spirit is conservative, and, in our opinion, embraces the present case. The defendant forgets that, although it might be deemed part of the contract, that the plaintiff should not be paid until the end of the year, it was equally, by legal intendment, a part of the contract, that he should have the security of the crop for such payment. The intended removal of the entire crop would have been a breach of that contract; and the manifest object of the Code is to anticipate and prevent such an injury, when the party presents just grounds of apprehension. See *Neilson v. Pool*, 17 La. 212.

It is, therefore, decreed that the judgment of the court below be reversed, and that the cause be remanded for further proceedings according to law; the defendant paying the costs of this appeal.

MCCALOP v. HEREFORD.

A memorandum in writing, though signed on Sunday, is admissible in evidence to prove a contract made on another day.

A PPEAL from the District Court of East Baton Rouge, *Burk, J. Lacey and Elam*, for the appellants. *Herron*, for the defendant. The judgment of the court (*Rosé, J. absent.*) was pronounced by

EUSTIS, C. J. This suit is brought to recover the balance due on a promissory note of the defendant, which the Union Bank had held, and which the plaintiff

McCALOP
v.
HEREFORD.

had paid and thereby become the owner of. It appears that the plaintiff had purchased from the defendant a plantation on which a stock mortgage existed in favor of the Union Bank; and, an order of seizure having been issued against it, the plaintiff paid to the bank the sum of \$5,000, which the bank applied, with the consent of the plaintiff, to the payment of a note of the defendant which the bank held, and the balance to the stock note of the defendant which bore on the property mortgaged. For the balance due on this note thus paid by the plaintiff the present action is instituted. A defence was set up, by way of exception, that the plaintiff had bound himself, for a sufficient consideration, to give the defendant five years to pay the amount. The exception was sustained by the District Court, and the plaintiff was non-suited. He has taken this appeal.

The note sued on was secured by a pledge of two hundred and thirty shares of the capital stock of the Union Bank; and the agreement relied on by the defendant purported, that the plaintiff was to give the defendant five years for the reimbursement of the amount the plaintiff should pay for him to the bank, on condition that he should transfer to the plaintiff the bank stock at the price two persons named should say it was worth, and give a mortgage upon certain negroes, which were also mortgaged to the bank, whenever McCalop, the plaintiff, should desire it. No notice or requisition has been given to the defendant to transfer the stock or execute the mortgage. This agreement was made, in October, 1847. It is proved by a memorandum signed by both parties, but written and bearing date on Sunday, the 7th February, 1848. It is contended by the counsel for the plaintiff that the contract itself was made on Sunday, and for that reason is not valid, and cannot be recognized as having any effect in a court of justice. Without deciding on the force of this objection, we have only to state that the agreement relied upon to give the defendant time is not proved to have been made on that day, but on some day in October, 1847. We have been referred to no authority for the opinion that a memorandum signed on Sunday is not admissible as evidence to prove a contract made on another day. This case presents features of great irregularity throughout. The action is not properly brought, the matter of defence is not well pleaded. The evidence, however, has been given on both sides, and the case must be determined on the state of things thus presented. We find nothing in the evidence which affects the validity of the agreement, nor do we find any default on the part of the defendant as to the compliance with his part of it. The affair between the parties is still open, and the contract thus partially executed by the plaintiff is subsisting, and, by reason of the agreement, the plaintiff's action cannot be maintained. The rights of the parties remain entire, and unaffected by the judgment of non-suit.

Judgment affirmed.

McGEHEE v. BROWN.

A planter who removes with his family to a village in an adjoining parish, for the purpose of having his children instructed at a school in the village, and occupies a house there, but who continues to perform the duties of a citizen of the parish in which his plantation is situated, and manifests, by continuous acts, his intention to retain his domicile there, cannot be sued in the parish to which he had removed with his family, for a merely temporary purpose.

A PPEAL from the District Court of East Baton Rouge, *Nicholls, J. Elam*, for the appellant. *Brunot*, for the defendant. The judgment of the court (*Rost, J. absent*;) was pronounced by

McGHEE
v.
BROWN.

SLIDELL, J. The defendant being sued in the District Court for the parish of East Baton Rouge, excepted to the jurisdiction of the court upon the ground that he was domiciled in the parish of Iberville. Two district judges have acted upon the evidence in this case; and on both occasions the exception was sustained. The case might be susceptible of a decision either way, if the testimony on one side only were considered. But looking to the evidence as a whole, we cannot disturb the conclusion of the court below.

It is true that, at the date of the citation, the defendant was present in the parish of East Baton Rouge, occupied a house there, and his wife and children were living with him. He had also been recently elected a vestryman of the church in that parish. But, on the other hand, it appears that, in 1841, he removed from the parish of East Feliciana to Iberville, having purchased a large sugar estate and a commodious dwelling house there; that he dwelt with his family on the estate until about a year before the institution of this suit, when he came with them to East Baton Rouge for the purpose of having his children instructed at a school in the town of Baton Rouge. He continued, however, to give his personal attention to his sugar estate, voted in Iberville, was placed on the venire and served as a juryman there after this suit was brought, and appears to have continuously performed the duties of a resident citizen of the parish, and to have been reputed such, during several years, and down to the trial of this cause. The object of his abode in East Baton Rouge seems to have been solely to have his children at the school, a temporary and contingent purpose, not inconsistent with the intention manifested by the continuous acts of the defendant to retain his domicile in Iberville.

Judgment affirmed.

REYNOLDS et al. v. HORN et al.

Where a judgment has been obtained here against a debtor, who subsequently died, in another State, leaving residuary legatees, who received their share of his succession, the administration of which in this State had been closed, but who are absentees, plaintiffs cannot proceed against them by appointing a curator *ad hoc* to represent them, and by a rule on them to show cause why execution should not issue against them on the judgment against their testator. The recourse which plaintiffs undertake to exercise being personal and involving matters *en pais*, they must proceed by an action in the ordinary form.

A PPEAL from the District Court of West Feliciana, *Stirling, J. Phillips*, for the appellants. *J. H. Collins, Ratliff and Cowgill*, for the defendants. The judgment of the court (*Rost, J. absent*;) was pronounced by

EUSTIS, C. J. In 1840, a final judgment was rendered against *Moses Horn* and others, stockholders of the late Feliciana Steamboat Company. On an appeal from this judgment, taken by two of the defendants, *Laurent Millaudon* and *James Dick*, it was reversed as to them. In 1842, *Moses Horn* died, in Tennessee, where he then resided, and by his will constituted *B. W. Cotton, Mary C. Cotton* and *Emily Dickson*, his residuary legatees. The plaintiffs took a rule against these parties to show cause why execution should not issue against each, for one-third the amount of said judgment thus obtained against the testator.

REYNOLDS
v.
HORN.

Being all absent, a curator *ad hoc* was appointed by the court to represent them. The legatees had received from the executor of *Horn's* estate their share of the effects of the succession, which was settled under a decree of the parish court of West Feliciana, in June, 1844. An attachment was attempted to be levied on a note belonging to them in the hands of their attorney, but the sheriff did not obtain possession of the note, nor was there any process of garnishment against the party who held it. The district judge discharged the rule, considering that the defendants were not properly in court by the curator *ad hoc* appointed to represent them, nor by the attachment, which he did not consider as reaching the property attempted to be attached. From this order discharging the rule the plaintiffs have appealed.

The mode of proceeding of the plaintiffs cannot be sustained. Their remedy against the defendants as representing *Moses Horn* and responsible for his debts, is by an action in the ordinary form. There is no warrant for the summary mode of calling upon the parties, who have never resided within the State, to show cause why execution should not issue against them on a judgment obtained against their testator. The administration of the succession in this State being closed, and the recourse against the defendants which the plaintiffs undertake to exercise being personal and involving matters *en pais*, the plaintiffs have their right of action, but we are not aware of any law which would authorize the mode of proceeding they have adopted. Such being our views, we think the district judge did not err in discharging the rule.

Judgment affirmed.

ORTES et al. v. LALLANDE et al.

The fact that the petition and citation were not served in the french language, the maternal tongue of the defendant, must be pleaded *in limine litis*. It affords no ground for reversing the judgment on appeal, nor for enjoining its execution.

On the dissolution of an injunction by which the execution of a judgment was arrested, damages to the extent of twenty per cent on the amount of the judgment enjoined may be allowed without proof.

A PPEAL from the District Court of West Feliciana, *Stirling, J. Haralson, Ratliff and Cougill*, for the appellants. *Phillips*, for the defendants. The judgment of the court (*Rost, J.* absent,) was pronounced by

EUSTIS, C. J. On the 12th of May, 1835, a judgment was rendered by the court of the Third District, held in the parish of West Feliciana, in favor of *Charles Morgan and Benjamin Poydras de Lallande* against *François Ortes* and the widow *Antoine Lacour*, for the sum of \$1312 50, with interest. The judgment was by default, and the default had been regularly entered on the 6th of May previous. It was not notified to the defendants until 1841. In January, 1842, execution was issued, and the defendants, who are the plaintiffs in this suit, caused the execution to be enjoined. On a hearing of the cause the injunction was dissolved, and the plaintiffs were adjudged to pay the sum of \$250 damages and costs of suit. Judgment for the same sum was also rendered against the sureties in the injunction bond. From this judgment the plaintiff, *François Ortes*, has appealed. In the petition for injunction the plaintiffs seek to annul the judgment on which the execution issued on the ground of fraud, and because the petition and citation

in that suit were served on them in the english language only, the maternal tongue of both being french. Of the first ground there is no sufficient evidence; and, as to the other, had the parties appealed, the cause assigned would not have been sufficient to have authorized the reversal of the judgment. *Leeds et al. v. Debuys*, 4 Rob., 258.

The damages allowed do not exceed twenty per cent on the amount of the judgment, and the District Court was justified in awarding them. Act of March 25, 1831, s. 3. *Brown v. Lambeth*, 2 An. 822. *Farrar v. New Orleans Gas Bank*. Ib. 873. *Judgment affirmed.*

ORTES
v.
LALLANDE.

UNION BANK v. MEEKER.

Parol evidence is admissible to prove the period at which a bill was intended to be payable, which was drawn payable "—— months after date," and discounted by a bank without filling up the blank. The testimony does not contradict the instrument, but supplies an omission, which, on the face of the contract, was either an oversight of the parties, or an intentional submission of the term to the discretion of the bank.

The cashier is a competent witness for the bank by which he is employed.

A PPEAL from the District Court of East Baton Rouge, *Burk, J. Winter*, for the appellants. No counsel appeared for the defendant. The judgment of the court (*Eustis, C. J.* not sitting, being interested, and *Rost, J.* absent,) was pronounced by

SLIDELL, J. The defendant *Walker*, is sued upon a promissory note of the following tenor :

" Clinton, La. 19th March, 1841.

"—— months after date I promise to pay to *John Henry Black*, or order, the sum of nine hundred dollars, for value received, negotiable and payable at the Branch of the Union Bank of Louisiana, parish of East Feliciana, waiving bank notice.

"Credit the drawer,

M. L. MEEKER.

"P. A. W.

("Endorsed) JOHN HENRY BLACK,

"P. A. WALKER."

The petition alleges that the note was intended to be at twelve months, and that the omission, or blank, was an oversight.

At the trial of the cause the plaintiffs offered to prove by the deposition of the cashier of the bank's branch at Clinton, where the note was discounted, that he was such cashier at the date of the note, and had been for several years previous; that it was given in renewal of an accommodation note of \$1,000, made by *Meeker*, on the 16th March, 1839, at twelve months, endorsed by *Walker* and *Black*, which was protested in March, 1840, and had lain over until its renewal by the note in question; that twelve months was the usual time of notes discounted at the branch; that it was the intention and understanding of the parties that the note should be payable at twelve months, and the omission was his own. To this testimony exception was taken, upon the grounds, that parol testimony was inadmissible, and that the cashier was incompetent by reason of interest. The exception was sustained by the court.

The testimony does not go to contradict the written instrument, but to supply

UNION BANK an omission, which, upon the face of the contract, was either an oversight of the
v. parties, or else an intentional submission of the term to the discretion of the
MEKKER. bank.

The cashier was not an incompetent witness. The rule which admits agents to testify in behalf of their employers as to matters in which they have been engaged, has its foundation in public convenience and necessity; for otherwise affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained. *Greenleaf*, Ev. § 416. Thus the porter, journeyman, or salesman, is admissible to prove the delivery of goods. So a factor to prove a sale of his principal's effects, though he is to have a commission on the amount. In the *United States Bank v. Stearns*, 15 Wendell, 346, the teller of a bank was held to be competent, in a suit for an over-payment made to the defendant upon his checks, to testify that, by mistake, he overpaid the defendant \$100. The court there said, the case came within the rule of necessity. It was, they remarked, extremely improbable that any person less interested than the teller could have any knowledge on the subject. It related to a transaction in the regular course of his business. These views apply with peculiar propriety to the cashiers of the country branches of our banks, who are generally the sole employés. See also *Franklin Bank v. Freeman*, 15 Pick. 539.

We are not to be considered as saying that even without the cashier's testimony the bank would not have a right to fill up the blank. See *Conchley v. Clarence*, 2 Maule, 90. *Collis v. Emmet*, 1 Hen. Bla. 313. *Russel v. Langstaff*, Doug. 496, 514. Chitty, p. 33, 240 and notes.

It is, therefore, decreed that the judgment be reversed and the cause remanded for further proceedings according to law; the defendant and appellee paying the costs of this appeal.

STATE v. JERRY.

Decision in *State v. Dick*, ante p. 182, as to the liability of a slave to be punished for murder, in killing another slave, affirmed.

After conviction it is useless to enquire by what authority the accused was arrested.

The provision of sec. 13 of the stat. of 1 June, 1846, directing that an affidavit be made before the arrest of a slave, is intended for the protection of his owner, who cannot be required to surrender his slave until facts shall have been sworn to authorizing a prosecution. The neglect of the master to insist on this right, is not an irregularity of which the slave can complain.

The statute imposing on the district attorneys the duty of prosecuting slaves accused of capital crimes, does not render their presence necessary to the validity of such proceedings. All the courts of the State are empowered to appoint counsel to prosecute on behalf of the State, in the event of the absence of the district attorney. Stat. of 28 January, 1817, s. 20.

An objection that a second justice of the peace was not present to aid in selecting the ten owners of slaves for the trial of a slave under the stat. of 1 June, 1846, must be made before the persons selected are sworn. If they are permitted to be sworn, without objection, it will be a waiver of the irregularity.

Where one accused of a crime is prosecuted as a slave, and he submit to a trial without objection, the fact of his being a slave will be considered so far admitted as to exempt the State from proving the slavery.

The stat. of 1 June, 1846, providing for the trial of slaves, does not require that the sentence should be signed by both justices of the peace. The signature of one is sufficient.

STATE
v.
JERRY.

APPEAL from a sentence pronounced by a tribunal organized for the trial of a slave in the parish of Madison. *Elmore*, Attorney General, for the State. *H. W. Dunlap, Hynes and Moore*, for the appellant. The judgment of the court (*Rost*, J. absent,) was pronounced by

KING, J. The accused was convicted of the murder of a slave, and from the sentence of the court has appealed. The grounds on which a reversal of the judgment of the lower court is claimed are: 1st. That no statute of the State makes the killing of a slave by another slave, murder. 2d. That the accused was not arrested in virtue of a writ issued upon a previous affidavit. 3d. That the district attorney did not assist at the trial, and the appointment of counsel to prosecute on behalf of the State was unauthorized by law. 4th. That the tribunal by which the accused was tried was illegal, and its proceedings void, because the assisting justice was not notified to attend until the day of trial, and was not present to assist in selecting the slave owners who served as jurors. 5th. That the accused was not proved on the trial to be a slave. And 6th. That the sentence was signed by but one of the justices.

I. The first point has been determined in the case of the *State v. Dick*, *supra* p. 182.

II. The slave was taken into custody, and his presence secured at the trial. It can be of no importance now to enquire by what authority he was arrested. The provision of the act of 1846 (Acts, p. 115, sec. 13), directing that an affidavit be made before the arrest of a slave, is intended for the protection of the owner, who cannot be required to surrender his slave until facts shall have been sworn to which authorize a prosecution. His neglect to insist on this right is not an irregularity of which the accused can complain.

III. The statute imposes upon the district attorney the duty of prosecuting slaves accused of capital crimes, but his presence is not made indispensable to the validity of the proceedings. All of our courts are vested with the power to appoint counsel to prosecute on behalf of the State, in the event of the absence of the district attorney. *Bul. & Cur. Dig.* p. 186, § 20.

IV. The objection that the assistant justice was not present to aid in selecting the ten slave holders, should have been urged before the jurors were sworn. The accused cannot be permitted, under the provisions of this statute, to accept jurors who may have been irregularly chosen, and after verdict take advantage of the irregularity. If he permit those to be sworn without objection, his silence must be considered as a waiver of the irregularity. See *State v. Isaac*, 3d An. p. 359.

V. The defendant having been charged as a slave, and having submitted to a trial as such without objection, so far admitted his condition as to dispense the State from proving his slavery.

VI. The signatures of both of the justices of the peace to the sentence are not required by the statute.

Judgment affirmed.

ARMOR, Executrix v. AMIS.

Plaintiff obtained a judgment on one of a series of notes, given to his testator for the price of land and secured by mortgage thereon, and defendant became the surety of the debtor in an appeal bond. The judgment was affirmed on the appeal. Pending this appeal proceedings were had by the holder of another of the series of notes, which had been negotiated by the executor, with his endorsement, and judgment was rendered therein, on his consent, under which the land was adjudicated to the holder of the second note. Plaintiff having subsequently attempted to execute his order of seizure and sale it was enjoined by the purchaser, and the injunction perpetuated. In an action by plaintiff against the surety on the appeal bond: *Held*, that defendant, if bound on his appeal bond, would be entitled on paying it to a subrogation to the rights of the creditor; and that the judgment by which the mortgage rights of the plaintiff were extinguished, which rights she contends that the appeal bond was given to secure, having been rendered by her consent, the surety is released.

APPEAL from the District Court of Madison, Selby, J. *Thomas and Snyder*, for the plaintiff. *Amonett, Stockton and Steel*, for the defendant. The judgment of the court (*Rost, J. absent*,) was pronounced by

EUSTIS, C. J. The plaintiff recovered a judgment against *Amis*, as surety on an appeal bond in which *Downes* was principal. From this judgment *Amis* has appealed.

The plaintiff had obtained an order of seizure and sale upon one of several notes given by *Downes* to the plaintiff's testator, which were secured by mortgage on a plantation and slaves. From the decree ordering the seizure and sale *Downes* took an appeal, and gave *Amis* as surety on the appeal bond. The condition of the bond was that the appellant should prosecute his appeal and satisfy whatever judgment might be rendered against him, or that the same should be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast on his appeal; otherwise that the surety shall be liable in his place. On the appeal the decree of the district judge was affirmed. 2 An. 243. Pending the appeal, certain proceedings were had on another of the mortgage notes given by *Downes* to the testator *Armor*, and which he had negotiated with his endorsement, by which the property subject to the order of seizure was adjudicated to a third person. When the order of seizure and sale in favor of the plaintiff was attempted to be executed, this party enjoined proceedings under it, setting up title in the property free from all mortgage. This cause was also before this court, in February, 1848 (3 An. 247), and on being remanded the injunction was made perpetual.

The purchaser of the property, who had thus cut out the plaintiff's mortgage, was also the holder of the note under which the sale was made, on which note *Armor*, the testator, was the endorser, and hence the plaintiff had a direct interest in having the note paid. Had the sale been set aside, the note must be paid from some other source than from the property which it was mortgaged to secure. We find accordingly that the judgment by which the mortgage rights of the plaintiff, which she contends the appeal bond was given by the defendant to secure, have been extinguished, was rendered on her consent. This judgment can give her no rights against the defendant, as the case is presented to us. The defendant, if bound on his appeal bond, on paying the debt, had a right to the

subrogation to the rights of the creditor. If it was the plaintiff's interest to impair those rights, and she has had the benefit of them in saving the succession of her husband from the responsibility of his endorsement, there is no foundation whatever for any demand against the surety; to whom they would belong in the event of recovery against him.

The judgment of the District Court is, therefore, reversed, and judgment rendered for the defendant, with costs in both courts.

ARMON
v.
AMIS.

EASTMAN v. HARRIS.

Hearsay evidence, admitted without exception, cannot be objected to afterwards.

To enable a party to become the owner of a thing which he finds, it is necessary that the former owner should have completely relinquished or abandoned it. C. C. 3384, 3387.

Where a raft of logs is accidentally stranded upon the land of another; and the proprietor of the land, though notified of the intention of the owner of the raft not to abandon it, cuts up the logs into firewood and sells them for a price exceeding, after deducting the cost of cutting them up, the value of the logs in their original condition, being a possessor in bad faith, and having thus put it out of his power to restore the thing in its enhanced condition upon being compensated for his labor; he will be responsible for the enhanced value of the timber when cut up for firewood, after deducting the cost of cutting it up. Such a possessor cannot be permitted to profit by his own wrong. C. C. 517, 518, 524, 2292. *Per Curiam*: As the plaintiff has asked for an affirmance of the judgment, which allowed him the value of the wood in the form of firewood, after deducting the cost of converting the logs into that form, it is unnecessary to decide whether a possessor in bad faith, under such circumstances, is entitled to compensation for the labor of converting the wood into a more valuable form, which is, at best, questionable.

APPPEAL from the District Court of Madison, *Selby, J. H. W. Dunlap, Thomas and Snyder*, for the plaintiff. *Short and Parham*, for the appellant. The judgment of the court (*Rost, J. absent*.) was pronounced by

SLIDELL, J. The plaintiff, who brought his action in December, 1847, alleges that, in the summer of 1847, a raft which belonged to him, and was in course of transportation down the Mississippi, was stranded upon the land of the defendant, and was afterwards appropriated by the defendant to his own use. Damages were claimed to the amount of \$490. The defendant pleaded the general issue. There was judgment in favor of the plaintiff for \$300, and the defendant has appealed.

The first point made by the defendant is, that the plaintiff has not proved his ownership of the raft. A portion of the evidence upon which the question of ownership turns, would have probably been inadmissible as being hearsay; but no exception was taken to it. It satisfied the mind of the district judge; and his conclusion on this question not being manifestly erroneous, we are not at liberty to disturb it.

The next point presented is, that the damages were excessive. For its proper consideration it is necessary to notice the facts of the case, and then examine the principles of law, which, under such circumstances, control the rights of the owner, and the liability of the party into whose hands the property has fallen.

It appears that during the high water, in April, 1847, one *Avery* was in charge of two rafts, and was floating them down the Mississippi, when they were accidentally stranded upon the defendant's land. The plaintiff's raft being inside, *Avery* cut loose the other which floated on. He left a man with the stranded

4	198
48	479
4	193
116	591
1116	596

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raft, directing him to take care of it, and deliver it to the plaintiff. The agent remained, and kept possession of it for some time; but was told by the defendant that, neither he, nor any one else, should have it, until the proper owner came for it. The raft remained aground for five or six months, when the defendant cut up the logs into fuel, and sold it. He stated to a witness, that no one had called to claim it; but that he expected to have some difficulty about it. It appears from the evidence, that the logs were about ninety in number, and were worth, in the situation in which they were, about one dollar per log. That the wood cut up into fuel was worth, according to the defendant's own estimate, \$3 per cord. The labor of cutting the logs into fuel and putting it on the bank of the river, in readiness for sale to steamboats, is proved to have been worth about eighty-one cents per cord. Each log would give about one cord and a half of fuel. A calculation made upon these data will show that the amount of damages given by the district judge is about the value of the fuel, less the expense of converting the logs into that form. If the plaintiff was only entitled to recover the value of the logs as they lay aground, the damages given by the district judge are excessive; but if he was entitled to the enhanced value of the logs, deducting the cost of their conversion into fuel, the judgment cannot be deemed excessive, and ought not to be disturbed.

Among the modes of acquiring property is occupancy. He who finds a thing which is abandoned, that is, which its owner has left, with the intention not to keep it any longer, becomes master of it, in the same manner as if it had never belonged to any body. Civil Code, 3384. But it is requisite that the former owner should have completely relinquished the chattel, before a perfect title will accrue to the finder; and there is a class of cases in which the presumption of law forbids the supposition of an intention to abandon. "We must not reckon," says the Code, "in the number of things relinquished, those which one has lost, nor that which is thrown into the sea in a danger of shipwreck to save the vessel, nor those which are lost in a shipwreck. For although the owners of these things lose the possession of them, yet they retain the property and the right to recover them." C. C. art. 3387.

In the present case the plaintiff has not only the benefit of the legal presumption, but has also shown by positive acts the intention not to abandon, and the communication of this intention at the time to the defendant.

The article just cited also shows, to a certain extent, the defendant's liability: "Those who find things of this kind cannot make themselves masters of them; but are obliged to restore them to their lawful owners, in the manner provided for by the special laws made on the subject." The rule is taken from the roman law, where the very case before us is an illustration. *Si ratis delata sit vi fluminis in agrum alterius, posse eum conveniri ad exhibendum.*

But is the owner entitled to take back the thing, when it has been converted by the industry of the finder or taken into another and enhanced form? Even where a person in good faith has employed materials which did not belong to him in making another article, the owner of the materials has a right to claim the thing made out of them on reimbursing the price of the workmanship. There is an exception, where the workmanship is so important that it greatly surpasses the value of the materials, as in the case of a statue which the statuary has made from a block of marble belonging to another. See Civil Code, 517, 518.

But if such would be the rights of the owner against a possessor in good faith, unquestionably the possessor in bad faith cannot complain if the thing is taken

from him upon reimbursing to him the price of his labor. Such a possessor cannot be permitted to *profit* by his own wrong. See Civil Code, 524, 2292.

Whatever in a mere moral point of view may be the defendant's freedom from blame, it is clear that, in a legal aspect, he was a possessor in bad faith. Under the stern rule of the roman law he who finds a thing that is lost, if he knows, or may know, to whom it belongs, and keeps it without an intention to restore it, or without endeavoring to discover the owner, is considered as committing a theft. Under our milder systems he loses the advantages which the law accords to good faith.

As the defendant has, by his own act, put it out of his power to restore the thing in its enhanced condition, upon being compensated for his labor, he cannot be relieved from a judgment which condemns him to pay an equivalent amount.

As the plaintiff has asked an affirmance of the judgment, it is not necessary to decide whether a possessor in bad faith, under such circumstances, is entitled to compensation for the labors bestowed upon it, and by which it has been converted into a more valuable form. But we may remark that it is at best questionable. The policy of the civil law was to sanctify and uphold the right of property by discouraging and punishing wrong doers; and we find a learned court of common law, in a case very like the present, applauding the wisdom of the civil law, and citing it as authority. We refer to the case of *Botts v. Lee*, 5 Johnson, 349, where a party had trespassed upon another's land, cut down the timber, and converted it into shingles. This was held not to change the title to the property, and the trespasser, it would seem, was not considered as having a right to remuneration for making them. In *Brown v. Sax*, 7 Cowen, 95, where logs had been cut on the plaintiff's land, drawn to the defendant's mill, and converted into boards, the judge charged that the measure of damages would be the value of the boards, without reference to the price of the defendant's labor; and this ruling was affirmed by the Supreme Court. There was a difference of opinion as to the technical question whether, in the particular form of action (trover) the damages should be confined to the value of the thing taken, but none as to the principle in cases of a wilful and tortious taking. See also *Baker v. Wheeler*, 8 Wendell, 505.

Judgment affirmed.

POSEY et al. v. WEEMS, Syndic, et al.

Where the creditors of an insolvent are the parties in interest in a contest as to a privilege claimed by one of them, the claim cannot be established by an action against the syndics; they represent the mass and not individual creditors.

APPPEAL from the District Court of West Feliciana, *Lawson, J. Ratliff and Cowgill*, for the plaintiffs. *Phillips*, for the appellants. The judgment of the court (*Rost, J.* absent,) was pronounced by

EUSTIS, C. J. *Margaret Posey* and her husband, the appellees, intervened in a suit between the syndics of *A. Dunbar* and *Stephen and Gideon Neville*, which was instituted for the recovery of the purchase money of a certain tract of land, bought by *Stephen Neville* at the sale of the insolvent's property. The petition of intervention claimed the price of the land under the privilege of the vendor, *Margaret Posey* having sold the land to *Dunbar*, the insolvent, who had never paid for it. He had placed this tract of land among his property on his

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schedule, and surrendered it to his creditors, whose syndics took possession of it, and sold it to *Stephen Neville*.

A tableau of distribution was filed by the syndics on the 13th of April, 1843, which was homologated, so far as not opposed, on the 23d of May following. On the 16th of December, 1844, the attorney of the appellees made an application for leave to file an opposition to the tableau, which application was disallowed. No mention is made on the schedule, or on the tableau, of the appellees or of the claim set up by them. The proceeds of the sale of this land, having been returned by the syndics in their account as assets, have been thus decreed to be distributed by the homologation of the tableau. *Neville* gave notes to the syndics for the price of the land, and these notes not having been paid, suit was instituted upon them, and, after an appeal to this court, judgment was rendered for the balance due on them. The appellees, intervening in this suit and claiming the vendors' privilege, had judgment against the syndics for the same amount, with a privilege on the proceeds of the sale of the land. The syndics have appealed. The case has been submitted on the written argument of the counsel for the appellees, without any argument on the part of the appellants. The privilege claimed by the appellees cannot be established in an action against the syndics; the parties in interest are the creditors claiming adverse rights to it. The syndics represent the mass, and not individual creditors. The creditors have a judgment on the fund to be distributed under the tableau, and we do not understand that their rights thus secured can be affected in an action against the syndics. That part of the judgment which gives the appellees the privilege is clearly erroneous.

The judgment of the District Court allowing the intervenors and appellees a privilege on the proceeds of the tract of land sold to *Neville*, is, therefore, reversed, and, in other respects, is affirmed; the appellants paying the costs of the appeal, and the appellees those of the intervention in the District Court.

FREEMAN, Syndic v. HOWELL, Administrator.

To make an account a stated account, it is not necessary that it should be signed by the parties. It is enough if it have been examined and accepted by both, and such acceptance may be inferred from circumstances. Hence an account rendered will be deemed to be an account stated from the presumed approbation or acquiescence of the parties, unless objected to within a reasonable time. What is reasonable time must be determined with reference to the relations of the parties, or the usual course of business of the particular class of persons concerned.

APPEAL from the District Court of West Feliciana, *Penn. J. Ratliff* and *Cowgill*, for the appellant. *Phillips*, for the defendant. The judgment of the court (*Rost*, J. absent,) was pronounced by

SLIDELL, J. This is an action upon two accounts of *John Goodin & Co.*, commission merchants, one with *Ebenezer Howell*, the deceased, and the other with the defendant as administrator after his death. The accounts appear to have been kept distinct on the books of *John Goodin & Co.* The items of the account with the deceased, begin in December, 1842, and end in July, 1843. Those of the account with his succession commence in October, 1843, and a balance is struck on

the 31st July, 1844; to which balance is added at foot, the balance of the account first mentioned. The items in these accounts are the usual matters of debit and credit in factor's accounts with planters; on the one hand, advances of money, plantation supplies, acceptances of drafts; and on the other, proceeds of sales of crops. The court below, considering the plaintiff's claim not proved, gave judgment as in case of non-suit, and the plaintiff has appealed.

The defendant does not appear to dispute the sufficiency of the evidence with regard to the charges for supplies &c.; but contends that, with regard to the charges for drafts of the planter paid by the factor, the drafts themselves should have been produced; and that the secondary evidence, the testimony of the clerk of the factor that they had been paid, was properly rejected. On the other hand the plaintiff contends that accounts current were sent from time to time, and that, as no complaint was made with regard to them, the planter must be considered as having acquiesced in their correctness; and the production of the drafts was therefore unnecessary.

To make an account a stated account it is not necessary that it should be signed by the parties. It is sufficient if it has been examined and accepted by both, and that acceptance may be implied from circumstances. Hence the principal seems to be well settled that, an account rendered will be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. What is a reasonable time, must be determined with reference to the relations of the parties, or the usual course of business of the particular class of persons concerned. See Story's Equity s. 526, and the cases there cited.

But giving the plaintiff the benefit of this principle, the testimony offered at the trial was not of that definite character which would authorize us to apply the principle in the case before us. The witness deposes as follows: "John Goodin & Co. were in the habit of sending an account current to each of their customers at the close of the season's business; and oftener than that, if they considered that their customers wanted too much in proportion to the extent of their crops or remembrance of their own obligations; an account current should always show what is owing to or by the individual to whom it is furnished—of course Mr. Howells' account was regularly, (or rather irregularly, he being one of the not too punctual,) transmitted to his customary address." It will be perceived that the witness speaks *inferentially* to the point of the transmission of accounts to Howell. But, even if he be considered as intending to assert positively that accounts were transmitted to him from time to time, yet upon this loose statement we cannot act with precision upon the items of the account, and say how many of its items must be considered as having been communicated to, and acquiesced in by, the planter. If it had been shown that, on a certain day, an account brought down to that day, and striking a balance, had been transmitted to the planter, and that the business and correspondence of the parties had subsequently proceeded as before without objection, there would then have been a basis laid upon which the judge below might have been required to say whether, under all the circumstances, the acquiescence of the party could reasonably be presumed, and down to what time, and as to what portion of the account sued upon.

Judgment affirmed.

CUNNINGHAM v. ERWIN.

Where a plaintiff, who had sued to recover a sum from defendant, and filed a supplemental petition praying for the rescision of sales and transfers of property alleged to have been made by defendant in fraud of his creditors, takes a rule on defendant to show cause why the issues presented by the petition and supplemental petition should not be tried separately, and the rule is made absolute, the court will be considered as having exercised its discretion as to the mode of trial best calculated to promote the ends of justice; and when no injury has resulted to the defendant therefrom, its decision will not be interfered with.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Watts and Spring*, for the appellant. *Mott and Grymes*, for the defendant. The judgment of the court was pronounced by

ROST, J. The plaintiff alleges that he was a creditor of the late *Henry Hitchcock*, in the sum of \$28,660 39 $\frac{1}{4}$, for work and labor performed and materials furnished in and about the buildings and grounds of said *Hitchcock*, in the city of Mobile, in the years 1838-39; that he has received on account \$12,000, as appears by the statement annexed to his petition.

He further alleges that *Hitchcock* had mortgaged to the president, directors and company of the Bank of the United States, all his property in the city of Mobile, including that upon and about which the petitioner had expended his labor, to secure a debt of \$800,000; that, after the death of *Hitchcock*, the bank became anxious to collect their claim, and to that end proposed to his legal representatives to take the mortgaged property in satisfaction and discharge of the debt, but that it was objected by the defendant, who is the brother-in-law of *Hitchcock* and the executor appointed by his will, that there were uncovered claims, amounting to \$150,000 and mostly held by mechanics and laborers, for which provision ought to be made; that it was finally agreed that the bank should pay into the hands of the defendant, as trustee for the holders of those claims, the sum of \$150,000; that the defendant actually received said sum, and assumed personally the payment of this and other unsecured debts. The plaintiff availing himself of the alleged stipulation in his behalf, asks a judgment against the defendant personally for the balance due him.

The defendant excepted to the action, on the ground that it is barred by the laws of the State of Alabama, where the succession of *Henry Hitchcock* was opened and declared insolvent. He further answered denying the indebtedness of the estate of *Hitchcock* to the plaintiff, and the receipt of any sum of money in trust or otherwise for the benefit of the plaintiff, or of any other creditor of *Hitchcock*; he averred that, in all things relating to the affairs of said estate, he had acted as the agent of *Mrs. Hitchcock*, his sister, and had fully accounted for all his acts to her, and disbursed for, and paid over to her, all sums of money received by him.

After the issue had thus been formed, the plaintiff filed a supplemental petition, by which he instituted a revocatory action against the defendant and asked the avoidance of certain sales and transfers of property alleged to have been made by him in fraud of his creditors. The exception taken by the defendant to this proceeding was dismissed, and an answer to the merits filed. At this stage of the cause the counsel for the plaintiff took a rule upon the defendant, to show

cause why the issues raised should not be tried separately, to wit: the issue of the indebtedness of the defendant to the plaintiff; and secondly, if said issue was found for the plaintiff, the issue of simulation. This rule was made absolute, and the issue of indebtedness was submitted to a jury who could not agree; a second trial was had with a similar result; and the parties then consented to take the opinion of the majority as the verdict. The majority of the jury were in favor of the defendant.

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The plaintiff moved for a new trial, which the judge refused, stating at the same time his unwillingness that the case should be carried to the Supreme Court, under the impression that he approved of the verdict. Two juries having already failed to agree, and the judge believing that if a new trial was granted no better result would follow, thought it best to compel the parties to carry their differences before the appellate court. From the judgment rendered on the verdict of the majority, the plaintiff has appealed.

The exception taken by the defendant in his original answer was properly overruled. In the account filed by the administrator the plaintiff is recognized as a creditor, though the amount due him is not set down, probably because he did not prosecute his claim against the estate. But nothing compelled him to incur that expense, as he may have been satisfied with the stipulation of the defendant in his behalf. If any thing could have been gained by proving the claim against the estate, the defendant might at all times have had the benefit of it by paying the debt. Moreover the law of the State of Alabama, requiring the creditors of insolvent estates to file and prove their claims within a limited time, under the penalty of forfeiture, was passed several years after the death of *Hitchcock*, and after the defendant is alleged to have assumed to pay the uncovered debts. The right of the plaintiff to be paid, if he is one of the creditors contemplated by the trust, was perfect, and could not be taken away by subsequent legislation.

The defendant alleges that the rule to separate the issues was improperly made absolute, and asks that the whole case be remanded, should the court think the plaintiff entitled to his action.

This is a question of practice, in which the district judge has exercised his discretion in the manner which to him seemed best calculated to promote the ends of justice. His decision has worked no injury to the defendant, and justice does not require that we should interfere.

On the merits, we consider it proved that the defendant received from the bank of the United States the sum of \$150,000, and assumed personally to pay the unsecured creditors of *Hitchcock*, one of whom he himself was to the amount of nearly \$40,000. The testimony of *Fisher*, *Brown* and *Barney*, leaves no doubt on our minds as to the nature of the agreement. The debts due by the estate, besides the claim of the bank, amounted nearly to \$250,000; but many of the creditors held collateral securities, and the defendant believed the sum he received sufficient to satisfy the uncovered claims. His efforts to conceal the agreement from the creditors whom he did not intend to pay in full, in order that he might purchase their claims at a discount, and the fact that, in one instance, he succeeded in doing so, show that his object in making the arrangement was to secure the amounts due him and his friends, and to speculate upon the necessities of the other creditors, most of whom were mechanics and laborers.

The sum thus received by him, being in his hands a trust fund for the benefit of a particular class of creditors, each of those creditors has the right to enforce the specific execution of the trust to the extent of his particular interest. It is

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what would be termed, under our laws, a stipulation in favor of third persons, of which they always have the right to avail themselves.

Considering that the plaintiff's allegations place him among the creditors of *Hitchcock* whom the defendant is bound to pay, the only question remaining is whether those allegations are true; and here we will premise that our decision rests upon the evidence applicable to the allegations as they are made. The plaintiff having claimed the value of his work, without alleging any contract, we have taken the value proved, in preference to the price stated by some of the witnesses to have been stipulated for part of the work. We have disregarded the probable estimates made by the witnesses, as we did in the case of *Seaton v. Second Municipality*, 3 An. 44. Statements that the work done by the plaintiff for *Hitchcock* was worth from \$25,000 to \$30,000, without any knowledge in the witnesses of the quantity of work actually done, are not evidence.

The plaintiff claims \$5,900 for making Water street, and \$300 for working on Conception street, under contracts. No contracts are shown, nor is there satisfactory evidence to show the quantity and value of the work done on those streets, and the liability of *Hitchcock* to pay for it. It results from the evidence that the corporation of the city of Mobile was to pay *Cunningham*, in bonds, for making Water street, and that *Hitchcock* was to cash those bonds. It is proved that the plaintiff transferred to *Hitchcock* city bonds to the amount of \$3,450 99, for which, under this agreement he is entitled to a credit, in a general settlement of accounts. Beyond this amount, the claim for making Water street must be disallowed; the claim for making Conception street, is not proved.

There is no conflict in the evidence as to the quantity of work done on the lots mentioned in the plaintiff's account for *Henry Hitchcock*. But it is otherwise with respect to the prices charged. The plaintiff's witnesses say that the prices are low, those of the defendant consider them too high, on the ground that the materials for filling up were furnished by *Hitchcock*, and were near the lots filled up. They say that those materials were worth at that time ten cents per cubic yard.

This distinction has not been made by the witnesses of the plaintiff. We think there is much force in it, and that the prices charged should be reduced. The reduction which we would feel disposed to make would probably bring down the average price of the work under thirty-seven and a-half cents a cubic yard. As however, it is admitted by the defendant's counsel, that thirty-seven and a-half cents a cubic yard is a fair average remuneration, we will take that to be the real value. A deduction of \$3,287 43½ will have to be made on that account from the amount claimed by the plaintiff.

The plaintiff admits credits, specified in his account, amounting to \$12,000. But *William Edmunds*, one of his witnesses, who was the clerk of *Hitchcock* before and at the time of his death, has testified, under a commission taken by the defendant, that he had knowledge of the state of accounts between *Hitchcock* and the plaintiff up to the time of the death of *Hitchcock*, and that he paid to the said plaintiff, for and on account of said *Hitchcock* all the items of the account annexed to the commission, at the times and dates therein specified; that the account is in his (the witness') hand writing; and that he has no doubt of its correctness. Besides the credits admitted by the plaintiff, this account contains charges of payments made to the plaintiff, on account of his work, and also for the rent of a house belonging to *Hitchcock*, which it is proved he occupied: these items amounting together to the sum of \$6,732 81, must be allowed.

The charge of \$375 for hauling brick is not proved. The witness *R. D. James* proves that *Isaac H. Erwin*, the administrator of *Hitchcock's* estate, paid on plaintiff's account the sum of \$1050 99, which is also to be deducted from his account.

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The credits to which the defendant is entitled, are as follows:

Deductions on the price charged for opening Conception and Water sts.	\$2,749 01
Deduction on the value of the work as charged,	3,287 43½
For hauling brick	375 00
Payments admitted	12,000 00
Additional payments proved by <i>Edmunds</i>	6,732 81
Payment proved by <i>R. D. James</i>	1,050 99

\$26,195 24½

This sum deducted from the amount of the plaintiff's claim, leaves a balance of \$2,465 14½, for which we believe him entitled to a judgment. In arriving at this balance, we have kept out of view the sum advanced by Major *Hitchcock* for the purchase of the plaintiff's property, this appearing to us a transaction in which the estate of *Henry Hitchcock* is not concerned. Under the laws of Alabama and the facts of the case, the plaintiff is entitled to eight per cent interest, from the judicial demand only. The transactions between the plaintiff and *Hitchcock*, were carried on in such a loose and irregular manner, as to make it extremely difficult to ascertain their rights with precision; if we have not reached the full justice of the plaintiff's case, the fault is not ours.

It is ordered that the judgment of the court below be reversed, and that the plaintiff recover of the defendant the sum of \$2,195 14½, with interest at the rate of eight per cent per annum from the 8th of April, 1846, till paid, and costs in both courts. It is further ordered, that this cause be remanded to try the issue of simulation.

MCDONALD v. LEWIS, Sheriff.

Where a debtor, in embarrassed circumstances, sells the contents of his shop to a third person, but remains in the shop acting as a salesman, and the purchaser, for his own advantage in business, retains the name of the former owner over the door, and the boxes and packages in the shop are marked with the name or the initials of the former owner, and, on an attempt by a sheriff to seize the goods as the property of the debtor, he and the purchaser inform the sheriff that they had been sold, but the purchaser does not exhibit his bill of sale, nor his books, offering nothing but his naked assertion to establish the sale, and the officer seizes and takes away the goods, but, on the trial of an action instituted against him by the purchaser for damages, brings the property into court, and offers to deliver it up if the court so direct, judgment will be rendered against the officer, though the court be satisfied of the *bona fides* of the sale, only for the restoration of the property, and for any damage it may have sustained from want of proper care while in the hands of the sheriff, and for costs. *Per Curiam*: The purchaser held out the vendor in a false light, to the public, and was bound to give the officer something more than his mere naked assertion as proof of sale. Nor are we prepared to say that there was such a legal change of possession as would perfect the sale against creditors, supposing it to have been real and *bona fide*.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Elmore and King*, for the appellant, cited *Barry v. De Russy*, 1 Rob. 76.

McDONALD v. LEWIS. *Peet v. Morgan*, 6 Mart. N. S. 138. *Yocum v. Bullitt*, Ib. 325. *Duperon v. Van Winkle*, 4 Rob., 39. *Lowry v. Erwin*, 6 Rob. 192. *Crocker v. De Passau*, 5 La. 39. *Walcott v. Pomroy*, 2 Pickering, 121. *Grinnell v. Phillips*, 1 Mass. 530. *Campbell v. Phelps*, 17 Mass., 244. *Jameson v. Hendrick*, 2 Blackford, 94. *William v. Lourdes*, 1 Hill, 579.

Lee and Grymes, for the defendant. The judgment of the court (*Eustis, C. J.* dissenting,) was pronounced by

SLIDELL, J. The court below was of opinion that the plaintiff had proved a *bona fide* purchase of the goods from *Tillotson*. I do not feel entirely convinced upon that point; but I will give the plaintiff the benefit of the district judge's opinion, and assume that the sale was real and in good faith. But what are the facts so far as the sheriff is concerned?

This sale, it is said, was made on the 16th February, 1847, upon which day the written bill of sale purports to be signed. *Tillotson*, the vendor, an embarrassed debtor, remains in the shop, acting as salesman, down to the time of the seizure. The sheriff's deputy goes, on the 9th April, 1847, to the shop, finds *Tillotson* there, and demands payment of the amount of the execution. *Tillotson* tells him he cannot pay. The officer replies, then I must seize the goods here. *Tillotson* answers, they are not mine. The officer retires, and in a little while returns, and threatens again to seize. At this second visit *McDonald* comes into the shop, while the officer is parleying with *Tillotson*. They both tell him *Tillotson* has sold the goods to *McDonald*. But all the surrounding circumstances contradict the naked assertion of the parties. *Tillotson's* sign is still on the outside of the shop. The boxes and packages are marked with his name, either in full or by his initials. *McDonald's* name appears nowhere. The attorney of the plaintiff in execution insists that the alleged sale is a mere pretence, and that the officer should proceed. The plaintiff, not exhibiting his bill of sale nor his books, and proffering nothing but his naked assertion, the officer seizes the goods and takes them away, and then this action is brought. The plaintiff's title is produced for the first time on the trial of the cause, and then the sheriff brings the goods into court, and says he is ready to deliver them immediately if the court should so direct.

It seems to me, if we hold the sheriff liable in this case as a trespasser, when he was willing to restore the goods, it would be a great hardship upon the public officer, and would be in reality enabling a party to take advantage of his own wrong. The plaintiff, even if he was a real purchaser, acted in such a way as to deceive the public, and this deliberately and for his own supposed interest. When *Tillotson's* clerk was about leaving the shop, shortly after the sale, he asked *McDonald* whether he was to erase *Tillotson's* name from over the door. *McDonald* replied, "that he would let it remain; that it would be of some advantage to him." It seems to me, such a course of conduct should be discouraged. It holds out the vendor in a false light to the public, and gives him a false credit. In the case before us, it led the public officer into an error, the consequences of which the plaintiff now seeks to impose upon him.

I think the plaintiff was bound, in good conscience, to give the officer something more than his naked assertion, thus violently opposed by all the surrounding appearances. Why was not the bill of sale shown, and the plaintiff's books, upon which he now relies?

The position of a sheriff is one of great responsibility. If he refuses to make a levy, and the plaintiff in the suit can show that the goods found in the possession of the defendant in the execution were in truth his property, he is entitled

to recover his debt *pro tanto* from the sheriff. And it seems that, in an action against the sheriff for a false return of *nulla bona*, it is sufficient to put the sheriff on his defence, for the plaintiff to show that the defendant in execution was in possession of property sufficient to satisfy the execution. *Magne v. Lyman*, 5 Wendell, 311. I do not find any textual provision in our laws, authorizing a sheriff to demand a bond of indemnity, and I have doubts whether he has a legal right to do so. If, on the other hand, he is to be held liable, as a wrong doer, for taking property which the owner has permitted to be surrounded by deceitful appearances, which entrap the sheriff, his double responsibility becomes grievous to a degree that appears to me unreasonable. I think very great weight is to be given to what was said in an argument by counsel, respecting what is properly characterized by the chief justice as a defect in our jurisprudence. At common law, when the sheriff is met by the assertion of an adverse title, he may impanel a jury to enquire in whom the property is vested; and their return will excuse him in an action of trespass. Bacon's Abridg. *verbo* sheriff. *Bailey v. Bates*, 8 Johnson, 143. With us a sheriff has no such power, and ought not to be held with the same severity to a party whose conduct was imprudent and well calculated to deceive the officer.

If this case were tested by the rules and principles of the common law, which has been invoked in argument by the plaintiff's counsel, I incline to the opinion that the sheriff would be permitted to return the goods upon payment of costs and mere nominal damages. I question if the action of trespass would lie in such a case; for, to sustain that action, it seems the *taking must* be unjustifiable. Hence it is declared by respectable authority, that if a sheriff take the goods of A. under a writ of *feri facias* after he has committed an act of bankruptcy, and afterwards the goods are assigned under a commission of bankruptcy, an action of trespass does not lie against the officer, although the goods do by relation become the property of the assignees from the time of committing the act; for as the officer might not know that A. had committed an act of bankruptcy, or that an assignment of the goods would be made, and as it was his duty to execute the writ, it would be unreasonable to punish him as a wrong doer. Bacon's Abridg. *Trespass*. So if A. mix his corn or money, with the corn or money of B., so that they cannot be distinguished, and B. take the whole, trespass does not lie, as there was a fault on the part of A. *Ib.* And so I should think a party would not be entitled to bring an action of trespass against the sheriff, who had left his goods in the possession of the defendant in execution in such manner as to give him all the appearance of ownership.

Then if the *taking* was not unjustifiable, the plaintiff would be driven to an action of trover; and I find it asserted by the same author that, in some cases, in that action it is allowed to bring the thing into court. "But herein", he remarks, "this distinction is to be observed; if trover is brought for a specific chattle of an unascertained quantity and quality, and unattended with any circumstances that may enhance the damages beyond the real value, but its real and ascertained value must be the sole measure of damages, then the specific thing demanded may be brought into court. But where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tort accompanying it that may enhance the damage above the real value of the thing, and there is no rule whereby to estimate the additional value, then it shall not be brought into court." So in *Brown on Action*, it is said: "If the defendant return the goods, the plaintiff will only recover such damages as he has actually sustained; but he is at all events entitled to nominal damages, as the return of the goods does not

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cure the conversion, but merely goes in mitigation of damages; and if there be a dispute as to the quantity of the goods converted, and the plaintiff refuses to receive back the portion offered, the court will, upon application for the purpose, stay the proceedings, on delivery of such portion of the goods and payment of costs and damages; and if the plaintiff refuse to accept such terms, will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequently to such delivery, in the event of his not recovering in respect of some other articles than those delivered up, or more than nominal damages in respect of those delivered up." *Brown on Actions, Trover*, p. 425.

The power of our courts cannot be less than those of common law, to mould the remedy to the justice of the case.

To these remarks I may add, that I am not prepared to say that there was such a legal change of possession as would perfect the sale against creditors, even supposing the sale to be real and *bona fide*. See *Hoffman v. Clarke*, 5 Wheaton, 549. In that case, which was trespass, against a constable, for taking a horse alleged to belong to the plaintiff, by virtue of an execution against A., the plaintiff's brother, it appeared in evidence that the horse had belonged to A., who testified that he had sold him to the plaintiff, before the execution, for a full price. Another witness produced by the plaintiff testified that the plaintiff and A. lived together, and that after the sale the plaintiff kept the horse in the same stable in which A. had kept him. The court then said, the law in order make sales of personal property good against creditors, and to prevent their being deceived by appearances, requires that there shall be an actual transfer of the possession, so far as the nature and condition of the property will admit of it. The circumstance of the seller and buyer of the horse boarding together in the same house, furnishes no ground for dispensing with such actual change of the possession as will render it *distinct and visible*, so that it may become notorious. It was surely practicable for the plaintiff to have taken possession of the horse, by placing him in a different stable, and either feeding and taking care of him himself, or to have procured some third person to have done so. So here, the plaintiff might have changed the sign, &c.

ROST, J. and KING, J. were also of opinion that the judgment should be affirmed.

EUSTIS, C. J. dissenting. The defendant, who is sheriff of the parish of Orleans, is sued by the plaintiff to recover the sum of \$1,332 25, damages for an alleged tort committed by him in taking and carrying away the plaintiff's property, consisting of a lot of shoes, trunks, &c. They were seized under an execution against one *Tillotson*, which was, including costs, for a less sum than \$200. After the evidence was given in and the trial finished, the defendant offered to restore and tendered the goods seized, if the court should be of opinion that the plaintiff had made out his claim to the property. The district judge decreed that the plaintiff should recover the goods, reserving his right to sue the defendant for whatever damages he might have sustained from a want of proper care and attention to the goods while in the defendant's custody, and ordered the defendant to pay costs. The plaintiff has appealed.

The suit was instituted on the 12th of April, 1847, and in the petition the value of the goods taken was alleged to be \$832 25, and the incidental damages are laid at \$500. By the minutes of the trial, it appears that the offer to restore the goods was made on the 4th of June following. We have not been favored with any authority or precedent of any case determined in this State, by which the

responsibility of parties to a suit of this kind has been held to be affected by a tender made at the time and under the circumstances attending this.

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A sheriff, under an execution against A. has no warrant or right to seize the property of B. In this case the defendant, under color of an execution against *Tillotson*, seized property which the district judge was satisfied belonged to the plaintiff. As the case stands before the court in relation to the property itself, the seizure and removal of the defendant's goods was a tort, for which he is responsible. The only question is, as to the extent of his responsibility. Under our laws, the sheriff has no authority to call a jury in the event of his having reasonable ground to doubt whether the goods to be seized be really the property of the debtor in execution. The responsibility in all cases appears, by the uniform decisions of the Supreme Court, to rest on that officer, whose only protection is the bond of indemnity which, in doubtful cases, is usually asked from the creditor. The embarrassments which usually surround the performance of the duties of a sheriff, particularly in a great commercial city like this, in consequence of the shifts and devices of fraudulent debtors in putting their property beyond the reach of their creditors by sham sales and otherwise, are very serious; the interests of the administration of justice call for some remedy for the evil by means of legislation. None better in all probability can be devised, than that which has been found necessary and practical, and is in operation in England and most of our States. A law empowering sheriff's to summon a jury to determine on doubtful questions relating to the ownership of property, which is directed to be seized in execution, modified as it there is by a settled jurisprudence, would be of great public benefit, and no more than a just protection to the public officer in the discharge of his difficult and important duties.

We have kept this case a long time under advisement in order to ascertain if, as the law stands, there was any principle on which the responsibility of the sheriff can be modified, in which we could all concur, and I am satisfied there is none.

The sheriff's officers in the present case acted without malice, and, I think, the defendant is only liable to the plaintiff for the value of the goods taken away. The officers in seizing did not close the store, nor interfere with the current business, and the goods were removed in the after part of the day to the depot of the sheriff. There is no evidence of any aggravation or wantonness attending the seizure. The name of *Tillotson* was over the door on the street. The boxes were marked in his name. It appears that the plaintiff had bought out the stock of *Tillotson* in this store on the 16th February previous, and *Tillotson* remained with him in the capacity of a clerk; and under the evidence, according to all external appearances, there was good reason for believing that *Tillotson* was still the owner. The facts, however, turned out otherwise, and I am compelled to consider *McDonald*, the plaintiff, as the owner of the goods, and the defendant as guilty of a tort, in seizing and removing them. My opinion is that the plaintiff is entitled to judgment for value of the goods seized.

It is particularly to be desired that, on questions of this kind, which determine the responsibility of the executive officers of the law, the opinions of the judges of this court should be unanimous, and it is with great deference that I dissent from that of my brethren in this case. The judgment of the District Court having found the sale of the stock of goods from *Tillotson* to the plaintiff, of the 16th of February previous to the issuing of the execution, to have been valid and *bonâ fide*, from which opinion this court does not dissent, and having given judgment

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for the goods in consequence of the tender made in court, and not concurring with the district judge as to the validity and effect of the tender as made, I am forced to the conclusion that the sheriff is liable to the plaintiff for their value, according to what I conceive to be a legal principle, which is a necessary safeguard of the right of property.

Judgment affirmed.

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A judgment which does not contain the reasons for which it was rendered, cannot have the force of *res judicata*.

An intervenor cannot complain of want of notice of an order made in open court, between the original parties. An intervenor is presumed to be always in court, ready to plead. C. P. 391.

Art. 1934 of the Civil Code does not apply to merchants' accounts.

The commercial law, as settled in the other States of the Union, is uniformly followed by the courts of this State, where no statutory provision prevents a resort to it.

By the general commercial law, where the custom of the place and the practice of the parties is to strike a balance of their accounts at fixed periods, and to render the account, the balance, composed of principal and interest to date, is viewed as the capital of the creditor, on which he is entitled to charge interest from that date. Acquiescence in an account so rendered, though not *per se* an agreement to it, is evidence from which it may be inferred that the party, who received it without objection, agreed to continue the same course of dealing, and to retain the balance on paying interest.

By the custom of this State, it is understood between planters and their factors that the latter are to render accounts annually, after the sale of each crop, and, if the balance in favor of the factor is not paid, that interest is to be charged on such balance, at the rate agreed on, though made up of capital and interest.

The laws regulating the rate of interest apply to commercial as well as ordinary transactions, and conventional interest cannot be changed in any case without a written agreement to pay it.

A preparatory decree, prescribing the manner of proceeding deemed necessary by the court to arrive at a final decision, cannot have the force of *res judicata*. It remains under the control of the court, subject to its revision, until a final decision.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* No counsel appeared for the plaintiff. *Briggs* and *Grymes*, for the appellant. *Seghers, Simon* and *Morphy*, for the intervenors. The judgment of the court (*Eustis, C. J.* not sitting, having been of counsel for plaintiff,) was pronounced by

Rost, J. Before the decision of the Supreme Court in the case of *Thompson v. Mylne*, in 2 Rob. 349, the defendant had filed two accounts, showing the situation of *George B. Milligan* with the firm of *A. & J. Dennistoun & Co.*, and with the Bellechasse plantation. After the case was remanded, the intervenors, who appear from that time to have superseded the plaintiff in the management of it, filed an opposition on a great variety of grounds, among which are the following: 1. The intervenors oppose all items in the accounts foreign to the concerns of the partnership, the same not being within the jurisdiction of the District Court. 2. They oppose the charge of \$4,462 35, for *Milligan's* third of the cost of 708 shares of Union Bank stock, secured on the plantation, on the ground that it was the private property of the defendant, who held it in his name, and borrowed money on it on his own account. 3. They oppose the manner in which interest is calculated in the whole account no. 2, as it imports interest on interest, contrary to all legal principles, and in violation of art. 1934 C. C. They asked, at the same time, that the defendant might be ordered to

file, in place of the accounts opposed, other detailed accounts, showing every transaction, every receipt and disbursement by and between the parties, reserving to themselves all legal objections to the same and to every part thereof, when they shall have been filed.

The court, without going into details, or giving any reasons, ordered that all the exceptions be sustained, except that in relation to the charge of the price of the bank stock, which was reserved to be investigated by the auditors about to be appointed. The court then ordered "that auditors be appointed, and that all matters of account be referred to them, with instructions to examine and investigate the same, and to report to the court the balance, if any, which may be due by the estate of *Milligan*, on the price of his third part of the Bellechasse plantation and slaves, conformably to the judgment of the Supreme Court, and the present judgment."

Auditors were accordingly appointed. The defendant produced before them the new account he was ordered to file in court, and they made a report thereon, in conformity with the directions of the court.

The intervenors having taken a rule upon the defendant to show cause why the report should not be homologated, he opposed the homologation on the following grounds: 1. That the auditors have rejected all the charges in the account which are personal to the late *G. B. Milligan*, and foreign to the partnership. 2. That they have rejected the charge for the cost of Union Bank stock. 3. That they have neglected to observe the mode of stating the accounts and of calculating interest, pursued by him, and by the firm of *A. & J. Dennistoun & Co.*

The intervenors contend that two at least of these three grounds of opposition have been already decided in their favor, by the decree appointing the auditors; that this decree has not been appealed from, and that the delays for appealing having expired, it forms *res judicata*. There is a fatal objection to the finality and binding force of this alleged judgment. It does not contain the reasons upon which it was rendered. If it was valid in form we could view it in no other light than as a preparatory decree, directing the auditors how to proceed in the adjustment of the accounts. The record contains ample evidence that it was so considered by the parties, by the auditors, and by the judge. Viewing it in that light, it is necessarily before us on the appeal from the judgment of homologation.

In relation to the first ground of opposition, it was held by the Supreme Court that the accounts concerning the partnership were within the jurisdiction of the District Court, but that all private claims against *Milligan* should be settled and liquidated before the Court of Probates. The jurisdiction of that tribunal having since merged in that of the District Court, and the evidence of the private, as well as of the partnership, debts being before us, we will proceed to adjudicate upon the whole, as far as the state of the case will permit us to do so.

The Bellechasse plantation was first acquired by *Dennistoun & Co.*, who sold one-third interest in it to *Milligan*. The accounts in the record show that the price of this third has stood ever since on the books of the firm as a debt due to it, and that the subsequent transfers of the property have not changed the original relation between the firm and *Milligan*. By the articles of partnership this firm was appointed factors of the plantation. It has acted in that capacity ever since, made all the necessary advances, and kept all the partnership accounts. In these accounts of the plantation, no items were charged or credited which did not appertain to the joint concern. But, besides these accounts, the partners

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had private accounts with their factors, and *Milligan*, who lived on the plantation, was in the habit of drawing upon them for all the small items of his private expenditure. In making up the yearly accounts, one-third of the nett proceeds of the crop was placed by the factors to the credit of *Milligan*; out of this third and of his salary as manager, the amount of his private account was first deducted, and the balance was credited to him on the price he had agreed to pay for his interest in the plantation.

Such appears to have been the course of dealing between the parties up to the death of *Milligan*. It was made known to *Alexander Dennistoun*, who so far from complaining, sanctioned it, requesting merely the firm to keep *Milligan's* private account down as closely as possible. The very sum of \$2,575 59, due by *Milligan* for his proportion of loss in a cotton speculation, which is specially objected to by the intervenors, appears to have been paid out of the proceeds of crops, with the assent of *Dennistoun*. Neither he, nor the defendant, have ever objected to these appropriations, and they do not object to them now. The intervenors have no right to raise the objection for them. *Bludworth v. Jacobs*, 2 An. 24. *Dunbar v. Bullard*, 2 An. 821.

It is alleged that this course of dealing, and the acquiescence of *Dennistoun* in it, are only proved by documents which, although found in the record, are not properly in evidence. The record shows that, on motion of counsel for the defendant, the plaintiff was ordered to produce and file in court, four days after the date of the order, all the papers and accounts which were inventoried in *Milligan's* succession, under the description of "A bundle of papers, containing Bellechasse accounts, and marked letter C." These papers were accordingly produced by the plaintiff, who, at the time of filing them, made oath of their identity.

The intervenors complain that this order was obtained *ex parte*, and granted in the dark, without any notice to them. Those complaints appear to us unfounded. No law requires personal notice to be given to intervenors in such cases. The application was made and the order granted in the usual form, and in open court, where intervenors are always presumed to be ready to plead. C. P. 391. The order bears date the 16th February, 1846, the very day on which the decree ordering the appointment of auditors was rendered. The minutes show that, on the next day, the counsel of the intervenors was present at the opening of the court, and appointed one of the auditors; the reading of the minutes must have informed him of the order granted the day before. He was bound to know, and, we have no doubt, did know, the contents of the minutes. Several days elapsed after this before the accounts were filed, and fifteen months were wasted in litigation before the rendition of the judgment appealed from. The intervenors had notice of the order and of the documents after they were filed, and suffered them to be received as evidence, without alleging either collusion or fraud against the other parties to the suit, or raising any other objection. They now contend that there is no evidence of the identity of those papers and accounts with those which were found by the judge in making the inventory; that they do not appear to have been paraphed and numbered as the law requires, and should not be considered as evidence. The defendant cannot be prejudiced by the omissions of the magistrate who made the inventory. It was stipulated in the contract of partnership between *Milligan* and the firm of *Dennistoun & Co.*, that annual accounts should be rendered to *Milligan* by his factors. His inventory makes mention of a bundle of accounts and letters found in his succession, and his executor, being ordered to produce those accounts and letters, has filed in court

such accounts as the factors were bound to render, and letters of *Mr. Dennistoun* and of the firm explaining some of those accounts. The warrantors were aware that the documents inventoried had not been paraphed by the judge, and that the inventory made no mention of their number. They might perhaps have opposed on those grounds their introduction as evidence, and required proof of their identity beyond the oath of the plaintiff; or, after the papers were filed, they might themselves have controverted that identity and attempted to disprove it by the books of *Dennistoun & Co.*, by the witnesses to the inventory, or by other persons present when it was taken. But as this has not been done, we must hold the return made by the executor to be *prima facie* true, and give effect to the evidence filed by him.

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We stated at the beginning of this opinion that, on the first trial of the cause in the District Court, the defendant offered in evidence the account of *Milligan* with the Bellechase plantation, taken from the books of *A. & J. Dennistoun & Co.* This account contains the following entry :

"One-third cost of seven hundred and eight shares of Union Bank stock, bought on account of plantation and owners, \$4,462 50."

The judge of the District Court considered that the word *owners* must have reference to *Mylne* and *Milligan*, and gave this, as his own reason, for deciding that *Milligan* was one-third owner of the plantation. On appeal, this decision was affirmed.

If this entry, found in the books of the common factors of the parties, is sufficient to prove the interest of *Milligan* in the plantation, it must *a fortiori* prove his interest in the stock. It has been urged that this account cannot make proof in favor of the defendant, by reason of his interest in the firm who kept it. *Milligan* was apprized of the existence of that interest when he made the contract which has given rise to this controversy, and the will by which he entrusted the settlement of his estate to the plaintiff in this suit. In selecting the firm as his factors, and the plaintiff as his executor, he intended to invest them with the rights of factor and executors; and so long as no fraud is alleged or shown, it is proper not to lose sight of that intention, and to give these parties the benefit of the character for truth and integrity upon which the confidence of *Milligan* reposed.

But it is shown, moreover, that the account containing the charge for the price of Union Bank stock, was rendered to *Milligan* with a memorandum, stating that it had been put in the name of *Milligan* for the sake of convenience, but belonged, in truth, to the owners of the plantation. A letter of *Alexander Dennistoun* corroborating this item of the account was also found in his possession; it is not shown that he ever repudiated the purchase, and no reasonable doubt can exist, that it was made on joint account. *Milligan* could not have been president of the Union Bank, if he had not been a stockholder of that institution.

The stock having no market value when the plantation was sold to *Benjamin and Packwood*, and standing at the time in the name of the defendant, it was not necessary to include it in the sale, and the transfer of it by the defendant on the books of the bank does not affect the right of the firm to charge the cost of it as it has done.

The last ground of opposition relates to the mode of stating the accounts, and of calculating interest. At the end of every year, a balance of accounts and a balance of interest was struck, and carried together to the new account, thus calculating capital and interest, and charging interest upon the whole. This

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mode of stating the accounts, was rejected by the auditors as being in violation of art. 1934 of the Civil Code, and the question now submitted to us is, whether that article is applicable to merchant's accounts.

The commercial law, as settled in the other States of this Union, has been uniformly followed by the courts of Louisiana, when no statutory provision has prevented a resort to it. Under that law it is well settled that, when it is the custom of a place and the practice of the parties to strike a balance at fixed periods, and to render the account, it brings it to the case of a fresh agreement, at the beginning of each period, to lend the sum then due; though acquiescence in the account rendered is not considered *per se* an agreement to it, it is evidence from which it may be inferred that the party who receives the account without objection, thereby agreed to continue the course of dealing and to retain the balance in his hands, rather than to pay it; the balance due is viewed as the capital of the creditor, which he leaves in the debtor's hands, on paying interest. The rule is that where regular merchant's accounts are settled from time to time, interest on interest is allowed. *Bainbridge & Co. v. Wilcox*, 1 Baldwin, 536, and authorities there cited.

In France, where a disposition of law very similar to art. 1934 of our Code exists, it is not considered as applying to merchant's accounts. "*Les comptes-courants peuvent être arrêtés à des époques aussi rapprochées qu'il plaît aux parties. Chaque fois l'intérêt s'y liquide, et fait partie du solde transporté au nouveau compte ouvert. Il se trouve ainsi converti en capital pour le compte suivant. Là règle du Droit Civil qui ne permet de capitaliser les intérêts qu'au bout d'une année, est dans ce cas sans application. Vincens, 2, 158. Peu importe que le compte soit établi entre deux commerçants, ou être un commerçant et un simple particulier.*" Dalloz, vol. 40, 221.

In adjudicating upon commercial transactions much uncertainty often arises in consequence of the non-adoption of the commercial Code, prepared by the framers of our Civil Code. It is safe to presume, however, that, in framing the Civil Code, they intended to leave our commercial jurisprudence as it was before, in harmony with that of other commercial nations. The application of art. 1934 to a case like this is inconsistent with that presumption, and we concur with the courts and jurists of France that it is not applicable.

It is well understood, between planters and their factors, that the latter are to render accounts annually after the sale of each crop, and if the balances existing in their favor are not paid, interest is to be charged upon them at the rate agreed upon, although they may be made up of capital and interest. The fact that this course of dealing is universal and never questioned so long as the relation of principal and factor continues, shows the popular interpretation of the commercial law on this point; but the rights of the factors in this case, to make annual rests in their accounts, does not depend upon usage; it results from an express stipulation in the contract of partnership. In the accounts rendered to *Milligan* under that stipulation interest was charged in the manner objected to; his agreeing to continue the same course of dealing after receiving them, was a tacit consent to their correctness so far as they could be ratified.

Considering that art. 1934 of the Civil Code is not applicable to merchant's accounts, *A. & J. Dennistoun & Co.* were authorized, under the contract of partnership, to charge interest at the rate of six per cent per annum on the entire balance of every annual account, rendered by them; but the laws regulating the rate of interest are applicable to commercial as well as to ordinary transactions, and they could not charge interest at the rate of eight per cent per annum

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on the cost of the bank stock, without an agreement, in writing of *Milligan* to pay it. The bank stock account never having been paid, the intervenors are entitled to a reduction of two per cent on the rate of interest charged. With this amendment the charges for interest are not illegal.

The defendant has asked that the case be remanded for a final adjustment of the accounts by the court from which the present appeal is taken. There can be no objection to this course. He farther asks that, for the balance which may be found under that final adjustment, the firm of *Dennistoun & Co.* may be decreed to be a creditor of the partnership.

When this case was before the Supreme Court it was stated in the opinion that, the balance which may remain due on the price of *Milligan's* share in the premises in partnership could not be considered as a partnership debt, to be satisfied by preference out of the partnership property; that his vendors, as such, cannot pretend to set up their claim as being a debt of the firm, to be paid out of the partnership assets; but in the decretal part, the right in question is not specifically and finally adjudged. After affirming the decree of the District Court, which was a final decree upon the title, and which title was thus finally adjudged, the decree proceeds to remand the cause for further proceedings in the partition of the partnership property and in the settlement and liquidation of the partnership concerns, and of the crops which the defendant is bound to account for as *negotiorum gestor*, for the purpose of liquidating the balance, if any, that may be due to the defendant, according to the legal principles recognized in this opinion, reserving to said defendant his right to prosecute his claim for such balance before the Probate Court in due course of law.

This is not to be considered as a final decree upon those rights of the parties not specifically adjudicated and closed by the decree itself. It is a preparatory decree, prescribing the manner of proceeding deemed necessary by the court to arrive at a final decision, and necessarily under its control until that decision is made. *Res judicata dicitur quæ finem controversiarum pronuntiatione judicis accipit, quod vel condemnatione vel absolutione contingit.* L. 1, ff. De Re Judic. "The thing adjudged does not exist before the judge has definitively pronounced on the contestation submitted to his decision, before he has admitted or rejected the claim, condemned or absolved the defendant."

These requisites have not been fulfilled in this case. The defendant has not been condemned by the decree of the court. Further proceedings were necessary to constitute *res judicata*, and the opinion of the court stands only as the enunciation of the legal principles which it considered applicable to the case, and remains as such under the control of the court, and subject to their revision. *Perkins v. Fourniquet*, 6 Howard, 208. *Sibbald v. United States*, 11 Peters, 491. *Clay v. His Creditors*, 9 Mart. 521. *Kittredge v. Breaud*, 2 Rob. 40. 4 Rob. 79.

These views are not in contradiction with those expressed in the cases of the *Succession of Durnford*, 1 An. 92, and *Kellam v. Rippey*, 3 An. p. 202.

In the first of these cases the former decree of the Supreme Court reversed the judgment of the Court of Probates, and remanded the case with directions to the judge below to give *McDonough* a credit on his account for the sum of \$18,000, and to close the account according to law. The *Succession of Durnford* was thus finally condemned to pay that sum, and the court could not review a matter finally determined by the decree.

In the other case, *Kellam*, the plaintiff, had been finally condemned to pay the defendant for his improvements, and the case having only been remanded for the

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purpose of ascertaining their value, this was the only question before the court on the second appeal.

We are satisfied that the question whether the debt due by *Milligan* is or is not a partnership debt, is still open, and as we cannot now finally pass upon the case, it must be referred to the District Court in which the succession is opened, to be decided in the classification of the debts.

It is, therefore, ordered that the judgment in this case be reversed, and the case remanded to the District Court for further proceedings, in conformity with the views expressed in the foregoing opinion; the intervenors and appellees paying the costs of this appeal.

THOMPSON, Executor v. MYLNE.

Where a case has been finally decided on its merits by the Supreme Court, and the contest still pending relates merely to the execution of the judgment, it is too late to intervene therein. C. P. 389, 394.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Briggs and Grymes*, for the intervenor and appellant, *Dennistoun, Seghers, Simon and Morphy*, for the widow and heirs of *Urquhart*, intervenors and appellees. No counsel appeared for the other parties. The judgment of the court (*Eustis, C. J.* not sitting, having been of counsel for plaintiff,) was pronounced by

ROST, J. In this case, as decided by the late Supreme Court, between the original parties and the heirs of *Urquhart*, intervenors, it was held that the succession of *Milligan* was the owner of the one undivided third part of the *Bellechasse* plantation and slaves, and the right of the executor to demand a partition of that property and of the crops made upon it, before and since the death of the testator, was fully recognized. 11 Rob. 349. The case was remanded for further proceedings in the partition and in the settlement and liquidation of the partnership's concerns, and of the crops which the defendant was bound to account for, as *negotiorum gestor*; and also for the purpose of liquidating the balance, if any, that may be due to the defendant, according to the legal principles recognized in the opinion of the court.

After the property had been sold, under a decree of court rendered in execution of the judgment, and after the parties had made some progress in the settlement of the accounts, *Alexander Dennistoun* intervened, alleging that he was the real purchaser of the plantation and slaves, when it was acquired from *Milaudon* and others, on the 11th January, 1822; that he had continued to be the sole owner, up to the present time; and that his exclusive right of ownership has been judicially recognized by the courts of this State; that on the 16th March, 1828, the firm of *Dennistoun & Co.*, of New Orleans, who managed the plantation for him, entered into a partnership with the late *George B. Milligan*, for the purpose of securing his attention to the place, and that a provision was made therein for his future acquisition of one-third interest in the property; that this agreement was not signed by the intervenor, nor did he ever give to the firm of *Dennistoun & Co.*, or to any of its members, any power to convey the land or any

interest therein; that the intervenor, residing abroad, and being incapable of exercising any direct control over the plantation, made a nominal transfer thereof to *Wm. C. Mylne*, on the 30th day of August, 1836; but that the said sale passed no real interest to the purchaser, who was a mere trustee for the purposes of administration, or for the sale and disposal of the property as the case may be.

The intervenor further alleging the death of *Milligan*, his indebtedness to him and to the firm of *Dennistoun & Co.*, and also the decree of the Supreme Court already referred to, prayed that all the parties to the original suit might be cited, and that he might be decreed to be the owner of the plantation in its entirety, and of the price which represents the third of it, until payment by the heirs of *Milligan* of the balance due him.

To this petition the heirs of *Urquhart*, intervenors in the original suit, excepted, on the ground that *Alexander Dennistoun* has no right to intervene in this suit, at its present stage, it having been finally decided on its merits by the Supreme Court, and the contest still pending merely turning on the execution of the judgment. The court below sustained the exceptions, and the intervenor has appealed from the judgment dismissing his petition. We cannot interfere with this judgment. The object of the intervention is to contest the title of *Milligan's* succession: the question of title has been finally determined, and we concur in the view taken by the District Court that, after a final judgment, it is too late to intervene. C. P. 389, 394.

The counsel for the intervenor contend that the judgment heretofore rendered has not the authority of the thing adjudged against him, and that so far as he is concerned, the matter is still open to investigation. If this were so, his remedy would be by a separate action. But it appears to us that, admitting that the sale made to the defendant passed no real interest to him, and that he was a mere trustee for the purposes of administering, preserving, and selling the property, he was also a trustee to stand in judgment, and the final decrees rendered against him are binding upon the intervenor.

Judgment affirmed.

VOGEL v. RETAUD et al.

An appeal will be dismissed where the matter really in dispute is under three hundred dollars, though damages are claimed to a larger amount, where the claim for damages is evidently fictitious. Such a claim can give no jurisdiction to the court.

A PPEAL from the Second District Court of New Orleans, *Kennedy, J.* *Biron*, for the appellant. *J. M. Wolfe, Collens and Pecquet*, for the defendants. The judgment of the court was pronounced by

King, J. The plaintiff alleges that under an execution directed against the property of her husband, the defendant, *Rétaud*, caused her separate effects to be seized. She avers the value of the property levied upon to be \$100, and prays that it be restored to her, and that the defendants be condemned to pay her \$250 as damages for the wrongful seizure.

The plaintiff's allegations in relation to damages are as follows: "The said *Rétaud* and *Mouney*, have caused, by the illegal, arbitrary and vexatious seizure of the property of your petitioner, a real, vindictive, and exemplary damage of two hundred and fifty dollars, having, without authority or right, seized and taken

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KING, J. The plaintiff alleges that under an execution directed against the property of her husband, the defendant, *Retaud*, caused her separate effects to be seized. She avers the value of the property levied upon to be \$100, and prays that it be restored to her, and that the defendants be condemned to pay her \$250 as damages for the wrongful seizure.

The plaintiff's allegations in relation to damages are as follows: "The said *Retaud* and *Mouney*, have caused, by the illegal, arbitrary and vexatious seizure of the property of your petitioner, a real, vindictive, and exemplary damage of two hundred and fifty dollars, having, without authority or right, seized and taken

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away the above described property from the possession of your petitioner, and deprived her at the same time of the use of her property to her damage and prejudice."

No circumstances of aggravation are stated, and thus the only basis laid for vindictive damages is the illegal taking. This claim for heavy damages in proportion to the value of the effects seized, unsupported by proof, is evidently a fictitious demand, which can give no jurisdiction to this court. The only amount which can be considered as involved in the suit is \$100, the alleged value of the effects seized. This case cannot be distinguished from that of *Orillion v. Slack*, 17 La. p. 103. See also 16 La. 183. 3 Rob. 143. 1 An. 311.

Appeal dismissed.

MONGET, Tutor v. WALKER et al.

4 214
51 1648

In an action by an under-tutor to remove a tutor, the accounts of the latter may be investigated for the purpose of proving his mal-administration; but an under-tutor has no authority to require a rendition of accounts by the tutor. After the dismissal of a tutor the right to call for an account belongs exclusively to the new tutor.

A judgment in an action instituted by an under-tutor against a tutor praying for his removal and for an account of the tutorship, may be annulled so far as to it compels the tutor to account to the under-tutor, and be left in force so far as it decrees the removal of the tutor.

A tutor owes his wards in all cases the funds which he receives belonging to them, with legal interest, and he can only shield himself from that responsibility by investing those funds, in their name, under a judgment of the court, rendered on the advice of a family meeting.

Where a tutor permits notes belonging to the estate of the minor to be barred by prescription, without showing any attempt to collect them, or offering evidence to prove that they could not be collected, he will be liable to the minor for their amount.

A PPEAL from the District Court of East Baton Rouge, *Burk, J. Lacey*, for the plaintiff. *Elam*, for the appellant, *Walker*. The judgment of the court was pronounced by

ROST, J. In 1835, *Parmley A. Walker* was appointed tutor of the minor children of the late *Alexander Wood* and *Rebecca Woodruff*. The property of the minors was sold on long credits, and the tutor received the proceeds of the sale. In 1845, the under-tutor instituted an action to deprive him of the tutorship, on various grounds alleged in the petition. There was also a prayer that he render an account of his administration. In answer to this petition the tutor consented to relinquish the tutorship. He further averred that he had invested the funds of the minors as they came to his hands, on what was deemed, at the time of the investments, ample security. That, in consequence of the monetary crisis of 1837, some of those securities had become unavailable, but that owing to the conventional interest he had received, the assets in his hands exceeded by more than \$4,000 the legal claim of the minors against him, and were more than sufficient to satisfy it. The notes and judgments described in his account were brought into court, and he asked that the account be approved, that the notes and obligations therein described be received in full satisfaction of the sum due by him to the minors, and that he be discharged from all further responsibility as tutor;

and his bond cancelled. In the absence of the plaintiff's counsel, the tutor in person had the case fixed, and tried it *ex parte*.

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v.
WALKER.

The judgment rendered was in these words:

"Finding the account of the tutor to be correct, and the assets offered by him sufficient to meet his liability, it is ordered that the account be approved and allowed, and that the notes, obligations and cash, the cash being fifty dollars, deposited in court by the defendant, be received in full of all claims against him as tutor. It is further ordered that he be discharged from further duties, responsibilities or liabilities as tutor, that his bond be cancelled and annulled, and that the legal mortgage resting upon his property be released."

The present plaintiff was subsequently appointed tutor, and, a large portion of the notes and accounts surrendered by *Walker* having proved valueless, he submitted the matter to a family meeting, and, on their advice and recommendation, returned to *Walker* such of the claims given by him in payment as were deemed unavailable, and instituted this action to annul the judgment of the Court of Probates, so far as it received those notes and accounts in payment of *Walker's* indebtedness to the minors; to compel him to render a new account; and to reinstate the legal mortgage raised by said judgment.

The answer of the defendant is that, the account rendered by him was duly homologated; that he has been legally discharged by a judgment acquiesced in by the plaintiff, who has no longer any right to question its correctness; that more than one year elapsed between the rendition of that judgment and the institution of the present action, which is, therefore, barred by prescription.

The judgment in the first instance was, "that the judgment of the Probate Court be avoided and set aside, so far as it discharges *Walker* from all liabilities as tutor, and receive the notes and judgments set forth in his account in payment of his indebtedness to the minors; that the plaintiff recover of *P. A. Walker*, the sum of \$5,958 18, with legal interest; that all the property belonging to *Walker*, from the day of his appointment as tutor, be decreed to be subject to the minors' mortgage and privilege, and that certain property described in the petition, and shown to belong to *Walker*, be seized and sold to satisfy this judgment." The amount of the judgment was reduced by remittiturs entered, and by other credits, to \$3,589 67. The defendant, *Walker*, then took a devolutive appeal.

One of the grounds urged against the validity of the judgment of the Probate Court is that, it was rendered *ex parte*, because provoked by the under-tutor, who might well institute proceedings to deprive *Walker* of the tutorship but has no authority to appear in behalf of the minors, so far as the suit involved a rendition of accounts by the tutor.

We hold this objection to be fatal. The under-tutor is without capacity to represent the minors in such a case; after the dismissal of the tutor, the right to call for an account belongs exclusively to the now tutor appointed. *McGhee v. Dupuy*, 7 Rob. 231. In an action to deprive the tutor of the tutorship, the under-tutor may undoubtedly investigate his accounts for the purpose of proving his maladministration; but, on that issue, no judgment accepting the accounts can be rendered.

The under-tutor being disqualified by law from appearing in the suit, so far as it involved the rendition of the tutor's accounts, the discharge of the tutor, the cancelling of the bond, and the raising of the general mortgage, were unauthorized by law, and the nullity of the judgment may be demanded at any time. C. P. art. 606, 612.

MONROE
v.
WALKER.

It is urged that the judgment cannot be annulled in part; and that, if it is entirely annulled, *Walker* is still tutor, and the plaintiff has no capacity to appear for the minors. The nullity being placed by the court upon the want of authority of the under-tutor to represent the minors, there is no reason why the judgment should not remain valid, so far as the authority existed. But if, on other grounds, the entire judgment was null, the nullity would not avail the defendant.

Walker was not deprived of the tutorship by the judgment of the court against his own consent. He resigned the trust voluntarily, dealt afterwards with the plaintiff as tutor, and has taken no exception to his capacity to sue. It is now too late to do so.

That the Probate Court could not receive in payment of *Walker's* indebtedness to the minors, notes and judgments which formed no part of their assets when he was appointed, is too clear for argument. These investments were made upon his own responsibility, and it would be strange indeed if he could thus be permitted to speculate upon events, retaining the profits, if any were made, and throwing upon his wards the losses attending his private transactions. The tutor owes his wards in all cases the funds which he receives belonging to them with legal interest, and he can only shield himself from that responsibility by investing those funds, in their name, under a judgment of the court, rendered on the advice of a family meeting.

The plaintiff has the undoubted right to compel *Walker* to account, and to enforce against him any judgment he may obtain. *Walker*, after he ceased to be tutor, stood as any other debtor of the minors.

The defendant contends that if the judgment is otherwise well founded in law, further deductions should have been made from it, and he states in his brief the items which should, in his opinion, have been allowed. We are unable to discover any error, in that respect, in the judgment. The evidences of debt were returned to *Walker*, as they had been received from him. Those of the notes returned to him, which originally formed part of the minors' assets were properly charged to him after he had suffered them to be lost by prescription, without showing any attempt to collect them, or offering evidence to prove that they could not be collected.

William F. Tunard and *S. H. Shipley* were also made parties defendants, and the plaintiff asked that certain property acquired by them from *Walker* might be subjected to the legal mortgage of the minors, or these parties compelled to pay over to him the price thereof, if *Walker* had not already received it; but as there is no final judgment on these issues, and no appeal properly before us in relation to them, we cannot pass upon them.

It is, therefore, ordered that the judgment rendered in favor of the plaintiff, *Parmley A. Walker*, be affirmed, with costs.

BENTON v. ROBERTS et al.

4 916
51 1518

The mere joint ownership of real estate confers no authority upon either of the joint owners to bind the other by a note.

The joint ownership of real estate does not create a partnership as to such real estate.

A special contract in writing is necessary for that purpose. C. C. 2807.

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v.
ROBERTS.

To enable one of the members of a partnership formed for the cultivation of land held by them as joint owners, to bind the other by a note made in the partnership name, an express authorization, or one clearly to be implied from the course of business of the firm, is necessary. In the absence of such express or implied authority it is incumbent on the payee to prove that the amount of the note inured to the benefit of the partnership.

Where one of the members of a partnership formed for the cultivation of land held by them as joint owners, the partnership not being shown to have been such as would convert the land into partnership property, and there being no express authority to either of the partners to bind the other by a note in the partnership name, and none implied from the course of the partnership business, executes a note in the partnership name, with a third person as surety, and discounts it, and applies the proceeds to the payment of a note given for the price of the land by which the joint purchasers bound themselves individually and *in solido*, and the note is paid by the surety, the latter can have no recourse against the partner who did not sign the note. The partner by whom the note was made was bound individually to the party by whom the note was discounted; the application of the proceeds made the party who signed the note a creditor of his copartner for half the amount so paid, but did not make the party who discounted the note a creditor of the partner who did not sign it; and when the surety paid the note he became subrogated only to the rights of the party by whom it was discounted.

A PPEAL from the District Court of Carroll, *Selby, J. Short and Parham*, for the appellant. *Bemiss, Thomas and Snyder*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. *James Roberts* having issued an execution on a twelve months' bond given by *Benton*, he obtained an injunction upon the ground that *Roberts* was liable to him upon a note of \$1,800, signed in the name of *A. C. & J. Roberts*, with *Benton* as surety, in favor of the Lake Washington and Deer Creek Railroad and Banking Company. It is admitted in argument that *Benton* has paid the note; and the only question is as to the alleged obligation of *James Roberts* to reimburse to him.

At the date of this note, *James* and *A. C. Roberts*, were the owners of a tract of land in Louisiana, which they had purchased of *Elliott*, and for which they had given him notes, signed by them individually, and by which they bound themselves, *in solido*, for the price. After their purchase they cultivated the land in partnership. No articles of partnership are proved, and our information with regard to its terms is meagre. The note given to the bank, and upon which *Benton* seeks relief, as surety against *James Roberts*, is signed in the partnership name; but the signature was made by *A. C. Roberts*. It was discounted by the bank, which was a corporation chartered and established in Mississippi.

The only testimony going to show what application was made of the money thus obtained, is that of *Elliott*, who says that, at a date shortly subsequent to the date of the note, his vendees made him a payment of \$1,500 in bank notes of that bank, on account of the first note held by him for the price of the land. The witness does not particularize whether the money was handed to him by *James Roberts*, or by *A. C. Roberts* in his presence. But, however, this may be, it is not shown that *James Roberts* knew the origin of the money, or was aware of, or assented to, the execution of the note. Upon the point of knowledge and implied ratification, we would not be warranted by the evidence in reversing the opinion of the district judge, who considered those facts as not proved.

There is no evidence that, by the terms of the planting partnership, the making of a note by *A. C. Roberts* in the name of the firm, was authorized. The case, therefore, rests only upon such authority as may have arisen from the relations of the parties, or such legal consequences as might result from the application of the money.

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v.
ROBERTS.

It is too clear to require discussion that the mere joint ownership existing between *A. C. and James Roberts*, conferred no authority upon *A. C. Roberts* to bind them both by the signature of the note in question. This mere joint ownership of real estate did not even create a partnership as to that real estate. For that purpose a special contract in writing is necessary. Civil Code, 2807.

Was any authority to do so derived from the existence of the partnership for the cultivation of the land, which they formed after their purchase. To enable one such partner to bind the other in the form and with the legal liability of an instrument like this, an express authorization, or certainly, at least, one clearly to be implied from the course of business of the firm, would have been necessary. In the absence of such express or implied authority it would be incumbent on the payee to prove that the amount of the note had accrued to the benefit of the partnership, thus enforcing a liability against the partnership rather by reason of the circumstances of the case than by force of the note itself. We have no evidence before us to satisfy any of these requisitions. On the contrary, the plaintiff assumes that the money was applied to pay a debt which was not the debt of the partnership, for it must be remembered that the partnership formed for the cultivation of the land is not shown to have been such as would convert the land into partnership property. It remained, as it originally was, the property of the two purchasers, each holding an undivided moiety. The price was due by the proprietors individually.

It remains then to be considered whether any legal liability of *James Roberts* to *Benton*, as surety on the note, has arisen from the fact that *A. C. Benton* applied a portion of the proceeds of its discount to the payment of the *Elliott* debt, for which *James Roberts* was bound *in solido*. As *A. C. Roberts* had no authority to bind *James Roberts* by the note, *A. C. Roberts* was bound alone and individually to the bank; and the application which he made of the proceeds of the discount to the payment of the *Elliott* debt made *A. C. Roberts* a creditor of *James* for one half of the amount so paid, but did not make the bank *James'* creditor, and when *Benton* was afterwards sued by the bank and paid the note, he became as surety, subrogated to the bank's rights, and to nothing more.

It is proper to add that the defence of *James Roberts* is strengthened by what occurred after the dissolution of the planting partnership between him and *A. C. Roberts*. A paper is in evidence, signed by the plaintiff and *A. C. Roberts*, in which they agree that certain debts due by *A. C. & J. Roberts* shall be borne by the plaintiff and *A. C. Roberts* equally. Among them is stated a debt to the Princeton Bank. It is proved that there was no bank at Princeton but the one in whose favor the note in question was drawn, and a witness who appears to have been familiar with the affairs of the parties states that, he was not aware of any other debt to that bank than the one created by the note. This evidence was excepted to, but was, we think, admissible under the pleadings.

Judgment affirmed.

LEDoux et al. v. RUCKER.

A sheriff cannot recover under the stat. 10 March, 1845, any compensation for the custody of

slaves seized under an order of seizure and sale, when he never had the actual possession of the slaves—never appointed a keeper to them, nor was ever subjected to any expense or trouble for their safe-keeping, or exercised any supervision over them.

LEDOUX
v.
RUCKER.

A PPEAL from the District Court of West Feliciana, *Lawson, J. Phillips* and *J. H. Collens*, for the appellants. *Ratliff* and *Cowgill*, for the sheriff. The judgment of the court was pronounced by

KING, J. Eighteen slaves were seized by the sheriff of West Feliciana, under an order of seizure and sale obtained by *A. Ledoux & Co.*, the execution of which was suspended by an injunction for nearly four years. The sheriff took a rule on the plaintiffs in that proceeding, to show cause why they should not pay him \$2,947 50, costs which he alleges have accrued in favor of himself and of his predecessor in office, for the safe-keeping of the slaves while under seizure, being at the rate of twelve-and-a-half cents per day for each slave. A judgment was rendered in favor of the plaintiff in the rule, and *A. Ledoux & Co.* have appealed.

The slaves appear to have been brought temporarily into the parish of West Feliciana, where they were seized, and, immediately after the seizure was effected, one of the defendants in execution was permitted to return them to his plantation, in an adjoining parish, where they have ever since remained under his care. No keeper was appointed for their preservation, and neither the plaintiff nor his predecessor appear to have had the possession or custody of the slaves at any time, from the moment of the seizure to the date of the trial. The officers appear to have been subjected to neither trouble nor expense of any kind for their safe-keeping, and exercised no supervision over them, the slaves having been removed to a different parish.

The testimony in the record shows what the services for keeping the slaves would have been worth, if the sheriff had taken them into actual custody, or appointed a keeper, neither of which was done. This case differs from that of *Découx v. The Bank of Louisiana*, recently decided, in which compensation was allowed to a sheriff for services actually performed in keeping slaves under seizure, under the act of 1845, *ante p.* See *Découx v. The Bank of Louisiana*, 2 An. 157. The plaintiff has not, in our opinion, presented a case which entitles him to compensation.

The judgment of the District Court is therefore reversed, and a judgment rendered in favor of the defendants in the rule; the plaintiff paying the costs of both courts.

BARCUS v. FARRAR.

Where one of the parties to a contract of exchange, by which one tract of land is exchanged for another, is evicted from the land received by him, the tract given by him in exchange represents the price, and its value, and not that of the land from which he was evicted, must determine the amount of damages. C. C. 2482, 2633, 2637.

A PPEAL from the District Court of West Feliciana, *Stirling, J. Phillips*, for the plaintiff. *Ratliff* and *Cowgill*, for the appellant. The judgment of the court was pronounced by

KING, J. The defendant, *Mary Ann Farrar*, conveyed a lot of ground in

BARCUS
FARRAR.

the town of Bayou Sara, with the buildings thereon, of which she declared herself in the act to be the owner, to the plaintiff *Barcus*, in exchange for a tract of land of one hundred and seventy-four acres. From the evidence it appears that, at the date of the exchange, the lot was under seizure, in virtue of a *fiery facias*, the execution of which had been suspended by an injunction obtained by the present defendant. The injunction was dissolved, and *Mrs. Farrar* held to have no claim to the lot. The sheriff consequently proceeded with his writ, and adjudicated the lot, operating an eviction of the plaintiff.

This action has been instituted by the plaintiff to recover back the land which he gave in exchange, or its value, which is alleged to be \$800, and the rent of the property from which he has been evicted, from the date of the eviction. The defendant denies, in her answer, that she was the owner of the lot at the date of the exchange, or that by the terms of the exchange she was bound to warrant the title. A decree was rendered against her in the court below for \$800, and the rent of the lot from the time of eviction, with the right of satisfying the judgment by reconveying the tract of land received by her in exchange, free from encumbrances created after she required it; and she has appealed.

There was no limitation in the clause of warranty. It is full and complete. The disclaimer now made by the defendant of ownership of the lot of which she declared herself in the act to be the owner, if proved, could certainly be no ground for resisting the plaintiff's claim. The only question which really arises is presented in bills of exception, taken on the trial below by the defendant to the opinion of the court receiving testimony to show the value of the tract of land given by the plaintiff in exchange, as the measure of damages. The defendant contended that the value of the lot from which the plaintiff was evicted was the correct test of the injury he had sustained: The district judge held otherwise; and, in our opinion, he did not err.

The plaintiff had by law the choice, to sue either for damages, or for the land which he gave in exchange. C. C. art. 2633. He claimed in the alternative the land, or, if it could not be restored, its value as damages. In contracts of exchange the parties are considered in the double light of vendors and vendees, and their obligations are governed by the rules which apply to the contract of sale. C. C. 2637. In a sale the purchaser who is evicted is entitled to the restitution of the price. C. C. 2482. The tract of land given by the plaintiff in exchange represents the price, the amount of which, in money, can only be determined by ascertaining the value of the property given. *Duranton, Exchange*, nos. 543, 545. The value of the property from which the plaintiff was evicted is no criterion by which to determine the amount of damages sustained, that not being the price which he paid.

Judgment affirmed.

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THE UNION BANK OF LOUISIANA v. JONES.

The testimony of a witness received and taken in writing on the trial of a case between the same parties for the same cause of action, where the witness has died since the former trial, will be open to all objections which might be taken if the witness were personally present; and where, on the first trial, the witness was objected to on the ground that, "being the drawer of the note sued on he was incompetent to testify for the indorser in a contest between the latter and the holder," and the objection was overruled, the party by

whom he was offered cannot require that his testimony should be received in the second case on the ground that the objection made did not point specifically to the true cause of objection that the defendant was the accommodation endorser of the witness, otherwise it would have been cured by a release, which the subsequent death of the witness has rendered impossible.

UNION BANK
v.
JONES.

Decision in *Union Bank v. Morgan*, 2 An. 418, as to the sufficiency of a presentment of a note for payment, affirmed.

A case will not be remanded, though material evidence was received below which was inadmissible, where, from the circumstances of the case the only effect of remanding it would be to delay the plaintiff, without promoting the ends of justice.

A PPEAL from the District Court of St. Tammany, *Penn. J. Halsey*, for the appellants. *J. R. Jones, pro se*. The judgment of the court (*Eustis*, C. J. not sitting, being a stockholder in the bank,) was pronounced by

SLIDELL, J. The first point to be considered is the admissibility of the testimony of *Minter*, the drawer of the note, of which *Jones* was the accommodation endorser. Since the trial of the former suit upon the same cause of action, *Minter* died, and the defendant offered, in the present suit, his testimony, as a witness for the defendant, taken in writing at the former trial. To the admission of this testimony the plaintiffs objected, upon the ground that it was given by a person having, at the time he gave it, an interest in the event of the suit, against the plaintiffs. The court permitted the testimony to be read to the jury, and the plaintiffs took a bill of exceptions.

The testimony of a deceased witness thus offered, is said by an author of great respectability, to be open to all the objections which might be taken if the witness was personally present. See *Greenleaf on Evidence*, § 163. In *Wright v. Tatham*, 1 Adolphus & Ellis, 24, Tindal, C. J., in considering the character and degree of such evidence and for what purposes it can be produced, observes, that it is direct and immediate evidence in the cause, for the same purpose and to the same extent as if the witness had been alive and sworn, and had given the same evidence in the witness box in the second cause. A very strong illustration of the rule, as laid down by *Greenleaf*, is presented in the case of *Crary v. Sprague*, 12 Wendell, 44. It was there held that a plaintiff, on the second trial of a cause, cannot give proof of the testimony of a deceased witness, who, on the former trial, was called by the defendant, and on his cross-examination gave evidence beneficial to the plaintiff, where the defendant showed that such witness, at the time of testifying, was interested in the event of the cause on the side of the plaintiff. It had been urged in argument that the defendant, by introducing the witness on the former trial, had declared his competency and credibility, and thereby precluded himself from questioning either. In answering the position the court remarked that this was undoubtedly true, so far as that trial was concerned, but no further; citing 1 Phil. Evid. 213.

When the former action was on trial, and *Minter* was offered, the plaintiffs objected to his testimony upon the ground, "that said witness, being the drawer of the note in question, was incompetent to testify for the indorser, in a contest between the latter and the holder of the note," which objection the court overruled, and admitted the witness. It is now urged by the defendant that the objection did not point specifically to the true and tenable ground of objection, to wit, that *Jones* was *Minter's* accommodation endorser; that if the specific objection had been presented, the defendant would have cured it by a release, which now, by the death of the witness, has become impossible. But if the implied declaration of a witness' competency upon a former trial would not, as we have just seen, preclude the enquiry on a second trial, *a fortiori* a positive resis-

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v.
FARRAR.

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Judgment affirmed.

4 220
47 775

THE UNION BANK OF LOUISIANA v. JONES.

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whom he was offered cannot require that his testimony should be received in the second case on the ground that the objection made did not point specifically to the true cause of objection that the defendant was the accommodation endorser of the witness, otherwise it would have been cured by a release, which the subsequent death of the witness has rendered impossible.

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v.
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JONES.

ance to the competency of the witness upon mistaken or vaguely stated grounds ought not to work such an effect. Moreover the fact that the defendant has once had the benefit of the testimony of an interested witness, seems a very unsatisfactory reason why it should be repeated. The object of evidence is the discovery of truth, and the reason why an interested witness is excluded is the fear that he would disguise and pervert the truth to promote his own advantage, and so lead the court or jury to a wrong conclusion. Such witnesses are excluded, not because they may not sometimes state the truth, but because in general it would be unsafe to rely upon their testimony. It is true that, if the specific objection had been made, and had been sustained by the court, the defendant might have executed a release in *Minter's* favor. But to make this argument effectual we should be obliged to presume that the defendant would have chosen to run the risk of that sacrifice before the testimony was heard and ascertained. Besides the defendant was bound to know the law. He, therefore, knew that *Minter* had an interest in favor of his success; and instead of removing it by a release before putting the witness on the stand, took the chance of benefit from that feeling of interest in the witness' mind, which, as was said by a learned judge, will, in spite of the utmost efforts of the most conscientious man, so often warp his memory, as to prevent him giving an accurate account of a transaction. Of course we make these remarks as matters of legal argument and principle, without intending in any wise to reflect upon the motives of the party in this particular case, or the character of the deceased.

We are of opinion, therefore, that the objection to the competency of *Minter* was still open.

With regard to his incompetency we refer to what we said in the case between the same parties, 2 An. 315.

We consider the certificate of the notary as satisfactorily proving that notice of protest was seasonably given to the endorser. Although the notary does not expressly state on what day he delivered the notice to the defendant's wife, yet, as he states the fact of such delivery as a thing already done, and his certificate bears date on the 27th October, it follows that the notice was not given at a later date. Consequently it was seasonable.

A witness was offered by the defendant to show that the notary was careless in completing his records on the day of protest or giving notice, and mentions two instances, neither of which include the record in question. Even if this testimony was admissible, it certainly could not destroy or impair the official record of this particular transaction. But, in our opinion, the objection was well taken, that the defendant should be limited to testimony of facts immediately relating to the record in question.

Upon this question of presentment for payment, this case is not distinguishable from that of the *Union Bank v. Morgan*, 2 Annual, 418.

Under ordinary circumstances we usually remand a cause when material evidence offered by the defendant has been received by the court below, and we dissent as to its admissibility. This is done upon the consideration that the party may have had other evidence to support his defence which he thought it was unnecessary to offer, evidence to the like effect being already accepted by the court. But, in this present case, the defendant was warned by the previous decision (2 An. 346,) that *Minter* was an incompetent witness; that his testimony, even if unobjected to, was not entitled to the same confidence as the testimony of a disinterested witness; and that, in itself, it was defective with regard to the matters pleaded in defence. We must conclude that this defendant has produced

at the second trial all the testimony which could be brought to bear upon the defence, and to remand the cause would only delay the plaintiff, without conducing to the ends of justice.

It is, therefore, decreed that the judgment be reversed, and that the plaintiffs recover of the defendant the sum of \$1,250, with interest thereon at the rate of seven per cent per annum, from the 29th day of October, 1842, until paid, and costs in both courts.

SUCCESSION
OF
GEORGE.

SUCCESSION OF GEORGE.

The curator of a vacant succession cannot claim that the succession be completely administered before surrendering possession to the heirs, nor require security from the heirs for amounts due to the creditors before delivering possession to them, but he may require the previous homologation of his accounts, and the allowance of all credits to which he is entitled for commissions and disbursements in the administration, and the homologation of a statement of the debts due by the succession, where the heirs or legatees are not domiciled in this State and are not citizens of any State in the Union, for the purpose of ascertaining the amount of the tax due to the State under sec. 4 of the stat. of 26 March, 1842, which amount he is bound to retain from the heirs and pay to the State, under the penalty of his personal responsibility.

A PPEAL from the District Court of St. Tammany, *Penn. J. Halsey*, for the heirs, appellants. *J. R. Jones*, for the absent heir. *Whitaker*, for the curator. The judgment of the court was pronounced by

SLDELL, J. The estate of the deceased being vacant, a curator was appointed. Subsequently the heirs, who are not domiciled in this State, and who, with one exception perhaps, are subjects of a foreign country, applied by their attorneys in fact to be put into possession of the estate. The court rendered a decree recognizing them as heirs, ordering the curator to render his account contradictorily with said heirs, and, after payment of all the debts and legal charges established against said succession, to pay over and deliver to said heirs, in equal portions, the balance of the funds and property belonging to the succession. Soon afterwards the curator filed his account stating the names of several creditors, whose debts had been acknowledged. Among them the State of Louisiana is noticed as a creditor, in an amount unascertained, for the tax on successions established by the act of 1842. From this decree the heirs have appealed. They contend that no authority is conferred on a curator to claim a complete administration before surrendering possession to the heirs; and that he cannot interfere on behalf of the creditors, and claim security from the heirs. They cite, in support of this position, the Code, arts. 1180, 1182; C. P. 1000, 1007; the case of *Fisk's Succession*, 3 Ann. 705; and *Graves v. Routh*, ante p. . Acts of 1828, p. 156.

By the 4th section of the act of 26th March, 1842, it was enacted: "That each and every person not domiciliated in this State, and not being a citizen of any State or Territory in the Union, who shall be entitled whether as heir, legatee or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent on all sums, or on the value of all property, which he may actually receive from said succession, or so much thereof as is situated in this State, after deducting debts due by said succession. When the said inheritance, dona-

SUCCESSION
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tion, or legacy consists of specific property, and the same has not been sold, the appraisement thereof in this inventory shall be considered as the value thereof. Every executor, curator, tutor, or administrator, having the charge or administration of succession property belonging, in whole or in part, to a person residing out of this State, and not being a citizen of any other State or Territory, shall be bound to retain in his hands the amount of the tax imposed by this act, and to pay over the same to the State treasurer, if the succession be opened in the parish of Orleans or Jefferson, or to the sheriff, if the succession be opened in any other parish; in default whereof every such executor, curator, tutor or administrator, and his securities, shall be liable for the amount thereof."

It is obvious that all the provisions of our Code and statutes relating to successions must be so construed, if possible, as to give them all effect. While it is our duty to enforce the rights of the heirs, it is equally so to protect the curator from personal loss in the administration of his trust, and the public treasury from the risk of an abstraction of that portion of the fund to which it is entitled.

It is evident then that, so much of the decree as directs the previous rendition of an account, was correct. The curator had a right, as against the heirs, to the recognition of all lawful credits in his favor, for his commissions, his disbursements in the administration of his trust, and any payment of debts lawfully due by the deceased. To this end the exhibition and homologation of an account was indispensable.

He had also a right to insist upon the exhibition and homologation of a statement of the debts due by the succession, for the purpose of ascertaining the amount falling to the State under the act of 1842, which amount, thus ascertained by him, was to be withheld from the heirs, and paid over by him to the State, under the penalty of his personal responsibility. The heirs might, perhaps, have removed this difficulty, by tendering ten per cent according to the inventory, but they did not do so, and evidently it was not their interest to do so. On the other hand, the curator was not entitled to withhold from the heirs the amounts due to other creditors, who had not chosen to exercise the right of exacting security, which the law gives them.

The only error, therefore, in this portion of the decree is, in directing the curator to retain what may be due to creditors other than the State.

The attorney appointed to represent the absent heirs suggests that there is error in the decree, in omitting to include *Margaret George*, a sister of the deceased, as one of the heirs; in giving the mother of the deceased only an equal share with the brothers and sisters, instead of one-fourth of the succession, and in treating the husbands of two of the sisters as heirs. The decree is clearly erroneous in this respect.

It is therefore decreed that, the judgment of the court below be reversed; and it is further decreed that, *Ann George*, the mother of *Alexander George*, deceased—*Connolly George*, the brother of the said deceased—*Rose Ann George*, wife of *John Steen*—*Mary Ann George*, wife of *Thomas Coun*—*Nancy George*, wife of *James Gilmour*—*Margaret George*, wife of *William Miller*—the said *Rose Ann*, *Mary Ann*, *Nancy*, and *Margaret*, being sisters of the deceased, be recognized as the legal heirs of the deceased, and be entitled to share in and receive the succession of said deceased after the proceedings hereby directed, in the proportion of one-fourth to the said *Ann George* the mother, and one-fifth of three-fourths to each of the said *Connolly*, *Rose Ann*, *Mary Ann*, *Nancy* and *Margaret*; that the account rendered by said curator be acted upon contradictorily

With said heirs, and, after due notice conformably to law; and that after the payment of the lawful charges incurred in the administration of said estate, the reservation of the tax coming to the State, and the allowance to said curator of all lawful credits, the residue of said succession be delivered to and distributed among said heirs in the proportion above adjudged, saving to the creditors of said deceased their right to intervene for the protection of their rights, before the final decree of homologation of said account; the costs of this appeal to be paid by the estate.

BIRD v. PATE, Administrator.

After a plea of prescription by an administrator, in an action against him for a debt due by the succession, it is too late to urge that the suit was prematurely brought, he never having refused to acknowledge the debt.

Notes payable to the order of minors, not being transferable by endorsement or delivery so long as the minority lasts, are not subject to the prescription of five years.

Where one who is under-tutor to a minor, borrows funds belonging to him, his responsibility, so far as he holds funds belonging to the minor, cannot be distinguished from that of the tutor; nor can the nature of that responsibility be changed by the form in which he may choose to put the debt.

Creditors cannot plead a prescription which would not have availed the debtor if pleaded by him.

A PPEAL from the District Court of East Baton Rouge, *Penn. J. Bennett*, for the plaintiff. *Ratliff and Cowgill*, for the appellant. The judgment of the court was pronounced by

ROST, J. *David Pate*, being the under tutor of the plaintiff and of his sister *Adelia Bird*, borrowed from their tutor three different sums of money, and gave for them three promissory notes payable to the order of the minors; the last of those notes bears date the 26th January, 1843, and became due on the 4th January, 1844. To secure the payment of these loans, *Pate* and his wife executed mortgages in favor of the minors before the parish judge acting as notary public, and certificates of that officer that such mortgages had been passed before him, stating the sums for which they were given, and containing a full description of the property mortgaged, were inscribed in the office of the recorder of mortgages. *David Pate* died, leaving the notes unpaid, and the defendant was appointed administrator of his succession.

In 1846, *Adelia* was emancipated by marriage, and the plaintiff was also emancipated under the provisions of the act of 1829. A partition of the succession of their father having been made between them, the notes of *Pate* fell to the share of the plaintiff, who instituted the present action upon them, in which he prays for a judgment with privilege on the proceeds of the property mortgaged, which is admitted to have been sold. The defendant pleaded the want of registry of the mortgage, and the prescription of five years. After the case had been tried on this issue, and judgment rendered in favor of the plaintiff, the defendant died, and the plaintiff himself was appointed administrator of the succession of *David Pate*. At this stage of the proceedings, *W. D. Baker*, alleging himself to be a judgment creditor of *David Pate*, took a devolutive appeal.

BIRD
v.
PATE.

It is admitted that the appellant is a mortgage creditor as alleged by him, and that his mortgage was inscribed on the 21st October, 1846. It is further admitted that the succession is insolvent, and that the proceeds of the property mortgaged are not sufficient to satisfy the two mortgages. Under these admissions, we consider the appeal as properly before us.

It has been urged in argument that the suit was prematurely brought, the administrator never having refused to acknowledge the debt. The plea of prescription filed by him is a sufficient answer to that exception.

On the merits: The last note of *Pate* shows that the plaintiff and his sister were both minors at its date, which is less than five years before the service of the citation in this case. The two first notes being made payable to the order of the minors, were not transferrable by endorsement or delivery, as long as the minority lasted, and the time elapsed since their majority is not sufficient to sustain the plea of prescription. Besides this, *Pate* was under-tutor of the minors; and, so far as he held funds belonging to them, we cannot distinguish his responsibility from that of the tutor. The nature of his responsibility cannot be changed by the form in which he may choose to put his indebtedness. It is urged that although *Pate* might not have pleaded this prescription, his creditors may. Creditors can plead no prescription which would not avail the debtor, if pleaded by himself.

We are of opinion that the amount claimed by the plaintiff is still due, but that the action of the court ordering that amount to be paid by privilege was premature. The judgment should have been for the amount claimed, to be classed in the general settlement of the succession; and must, therefore, be reversed.

It is ordered that, the judgment in this case be reversed. It is further ordered that the plaintiff be recognized as the creditor of the succession of *David Pate*, deceased, for the following sums; 1st. Two thousand five hundred and sixteen dollars, with interest at the rate of ten per cent per annum from the 7th January, 1841, till paid. 2d. Three thousand eight hundred and thirty-two dollars and forty cents, with interest at the rate of ten per cent per annum from the 7th January, 1842, till paid. 3d. Three thousand five hundred dollars, with interest at the rate of ten per cent per annum from the 4th January, 1842, till paid. It is further ordered that, the rights of the plaintiff on the proceeds of the property alleged to have been mortgaged to him, be reserved, and that this judgment be classed in the general settlement of the succession. It is further ordered that, the succession of *David Pate* pay the costs in both courts.

MOORE v. McKIERNAN.

In a partition of land ordered to be made in kind the notary cannot dispense with the drawing of lots, without an express agreement in writing made by the parties and notified to him.

A PPEAL from the District Court of Madison, *Selby, J. Amonett*, for the appellant. *H. W. Dunlap*, for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiff has appealed from a judgment setting aside a partition made by the notary appointed by the court for that purpose. The property

divided is a tract of land, of which the plaintiff owns one undivided fourth and the defendant the remaining three-fourths.

MOORE
v.
McKERNAN.

The grounds of the opposition to the homologation of the partition, which prevailed in the court below and on which the appellee relies, are as follows: 1st. The notary should have divided the land in four equal parts as to value, and set apart the share of each party, so that the three lots of the defendant should adjoin one another. 2d. The testimony shows that lot no. 4 is equal to one-fourth of the value of the whole tract, and the defendant insists that the notary should have assigned that lot to the plaintiff. 3d. The partition as made has injured the value of the three lots assigned to the defendant, at least five dollars per acre.

1st. The land was divided in four lots of equal dimensions, and having an equal portion of front on the Mississippi river, in strict conformity with the order of survey granted by the judge on the application of the plaintiff, and without opposition from the defendant. Under that order, the surveyor had nothing to do with the value of the lots. The intention of the parties was that the survey made should be taken as the basis of the partition, and that the value should be ascertained by the experts. This was done in presence of the agents of both parties and without any opposition from them. Under the facts of the case, the notary could not have acted otherwise than he did.

2d. Without an express agreement of the parties, made in writing and notified to the notary, authorizing that officer not to draw lots, he could not dispense with that formality; and if it be true that the partition made has injured the value of the three lots assigned to the defendant, it is a risk which he took when he consented to a partition in kind, without making proper reservations.

The partition is legal and binding, and no reason has been or can be given for setting it aside.

It is therefore ordered that the judgment in this case be reversed. It is further ordered that the partition made between the plaintiff and defendant, before *Malcolm Wallace*, a notary public, on the 29th March, 1848, be homologated and made the judgment of the court. It is further ordered that the defendant pay the costs of this appeal; those of the court below to be paid as provided by the act of partition.

PIKE et al. v. MONGET, Tutor.

Art. 3298 of the Civil Code, which provides that a mortgage exists, without being recorded, in favor of minors on the property of their tutor, is an exception to the rule laid down in art. 3314, that mortgages shall only be allowed to prejudice third persons when they have been properly recorded.

Good fide purchasers, without notice, who have paid the price, are not affected by secret equities existing between those under whom they hold and third persons, nor by their misrepresentations and frauds.

Where a tutor sells a lot of ground belonging to him individually, on which a legal mortgage existed in favor of his pupil, taking a note payable to himself individually for the price, and, without any legal transfer of the note to his pupil, sues on it as tutor, and recovers a judgment as such with a special mortgage on the property, and receives from a purchaser of the property at a sale subsequently made by the sheriff, the amount of a note given for the price, the tacit mortgage in favor of the minor will be thereby annulled; and the purchaser, holding under a judgment and judicial sale clothed with all the forms and solemnities of law, will not be allowed to be prejudiced by the misrepresentations of the tutor. *Per Cu-*

PIKE
v.
MONGET.

riam: Third persons acquiring rights in good faith, under such a judgment, have nothing to look to beyond the judgment and proceedings under it. If the minor be injured by the misrepresentations of the tutor, the remedy is against him, and the surety on his bond.

APPEAL from the District Court of East Baton Rouge, *Nicholls, J. Brunot and Elam*, for the appellants. *Larey*, for the defendant. The judgment of the court (*King, J. absent*.) was pronounced by

ROST, J. This is a sequel to the case of *Monget, tutor, v. Walker*, lately determined, *ante* p. 244.

The plaintiffs, being in possession of a town lot acquired from *Walker*, while he was tutor, the defendant proceeded against them by the hypothecary action, after the judgment obtained in the former suit had become executory. The plaintiffs enjoined the proceedings. *George A. Pike*, who owns a portion of the lot, then intervened, and the proceeding was changed by the pleadings from the *viâ executivâ* to the *viâ ordinariâ*. The judgment of the District Court recognized the mortgage, and ordered that, in default of payment of the sum due the minors by the plaintiffs in injunction, the portion of the lot claimed be sold to satisfy it. It further ordered that a separate appraisement be made before the sale of the land, and of the improvements thereon not subject to the mortgage. From this judgment the plaintiffs have appealed.

Many of the points made by the plaintiffs having been determined in the case of *Monget, tutor, v. Walker*, it is only necessary to notice the following: 1st, That the minors' mortgage, not having been recorded, did not affect the land seized at the time it was purchased by the plaintiffs in injunction. 2d. That this lot originally belonged to *P. A. Walker* and *Alexander H. Jones*, and has become the property of the plaintiffs in injunction under a regular chain of conveyances; that, in the sale of the eastern half of the lot and improvements by *Walker, Amos*, and *Frederick Kent*, who were then the owners of it, to *Rees Fitzpatrick, Walker*, as tutor of the minors, sued upon two of the notes given by *Fitzpatrick* for the price, and obtained a judgment, in his capacity as tutor, with special mortgage on the property; that the said property was subsequently sold at sheriff's sale, on the 4th of November, 1843, and purchased by *D. D. Avery*, who paid the purchase money; that *Avery* afterwards sold to *William S. Pike* for \$600, \$200 cash, and the residue in two notes of \$200 each, and that the present tutor has received payment of the said two notes.

It is contended that the judgment and judicial sale in the suit of *Walker*, tutor, against *Fitzpatrick*, and the receipt by the present tutor of the \$400 from *Pike*, had the effect of annulling the original tacit mortgage existing in favor of the minors, from the time of *Walker's* purchase in 1838.

1. A mortgage exists without being recorded, in favor of minors on the property of their tutor. C. C. 3298. This positive disposition of law is an exception to the rule laid down in art. 3314, that mortgages shall only be allowed to prejudice third persons when they have been properly recorded. *Roche's Heirs v. Grosillière*, 13 La. 246. *Lessussier v. Dashiell*, 14 La. 468. 17 La. 194. *Cleveland, tutor, v. Spruel*, 12 Rob. 174.

2. The second ground is one of much greater difficulty. If the notes on which the suit was brought had previously been lawfully transferred to the minors, we would have no hesitation in saying that the defendants would be protected by the judgment and judicial sale, and that the property would have passed to them free from the legal mortgage; but it is admitted that, at the time of the rendition and execution of the judgment, the notes belonged in reality to *Walker*, and the embarrassing question is thus presented, whether the misrepresentations of the

tutor are to prejudice the minors, in whose name he falsely pretended to act, or the *bond fide* purchasers of property under a judgment and judicial sale clothed with all the forms and solemnities of law.

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v.
MORRIS.

That honest purchasers without notice, who have paid the purchase money, are not affected by secret equities existing between those under whom they hold or by their misrepresentations and frauds, is a fundamental rule of our system of jurisprudence, and we believe of every other. Against a party thus situated, courts of Equity, where the common law prevails, never give a remedy. "Courts of Equity will not take the least step imaginable against an innocent purchaser in such a predicament, and will, on the other hand, allow him to take every advantage which the law gives him, for there is nothing which can attach itself upon his conscience, in such a case, in favor of an adverse claim." Story's Equity Jurisprudence, no. 1503.

If the present case should form an exception to that rule, the exception must rest upon the law made for the protection of minors. After an anxious and mature consideration of those laws, the conclusion is forced upon us that they have exclusive reference to contracts and rights of property. No peculiar formality is prescribed in relation to actions instituted by tutors for the recovery of money. The tutor administers by himself alone, and his capacity to appear in court, in such cases, is unqualified and absolute. Civil Code, 344. Third persons acquiring in good faith rights under the judgment which he obtains, have nothing to look to beyond the judgments themselves and the proceedings under them.

If the minors are injured by the false representations of the tutor, their remedy is against him and the surety on the bond which he has given for his administration. We are of opinion that the judgment should have been in favor of the plaintiffs in injunction.

It is, therefore, ordered that, the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs in injunction, and against the defendant, with costs in both courts.

BRADFORD v. COOK, Tutor.

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48 1084

There can be no ratification where there is no title.

One who had been a probate judge cannot, after he has ceased to hold the office, authenticate a sale made by him when in office.

Parol evidence is inadmissible to prove a title to real estate.

The receipt by the tutor of a portion of the price of land belonging to minors, can never be construed into a ratification of a sale, to their prejudice.

Parol evidence, inadmissible to prove a title to real estate, cannot be received to prove the nature of the possession of a party, in order to establish that, as a possessor in good faith, he was not liable for rent, and entitled to recover the value of his improvements. Where questions of title arise in actions for damages the proof required is the same as in petitory actions.

APPPEAL from the District Court of East Baton Rouge, *Burk, J. Lacey* and *A. Muse*, for the appellant. *A. M. Dunn*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

ROST, J. The plaintiff married the widow *Atkins*, whose children by her former marriage are the defendants in this suit. Shortly after the death of his wife, he instituted proceedings in the Court of Probates for the purposes: 1st,

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v.
MONGET.

riam: Third persons acquiring rights in good faith, under such a judgment, have nothing to look to beyond the judgment and proceedings under it. If the minor be injured by misrepresentations of the tutor, the remedy is against him, and the surety on his bond

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Rost, J. This is a sequel to the case of *Monget, tutor, v. Walker*, determined, *ante* p. 244.

The plaintiffs, being in possession of a town lot acquired from *Walker*, who was tutor, the defendant proceeded against them by the hypothecary action the judgment obtained in the former suit had become executory. The court enjoined the proceedings. *George A. Pike*, who owns a portion of the lot, intervened, and the proceeding was changed by the pleadings from the *recurso* to the *via ordinaria*. The judgment of the District Court recognized the mortgage, and ordered that, in default of payment of the sum due the plaintiffs in injunction, the portion of the lot claimed be sold to satisfy the mortgage; and further ordered that a separate appraisement be made before the sale of the lot and of the improvements thereon not subject to the mortgage. From this judgment the plaintiffs have appealed.

Many of the points made by the plaintiffs having been determined in the case of *Monget, tutor, v. Walker*, it is only necessary to notice the following: That the minors' mortgage, not having been recorded, did not attach to the lot at the time it was purchased by the plaintiffs in injunction. The lot originally belonged to *P. A. Walker* and *Alexander H. Jones*, who sold it to the plaintiffs in injunction under a regular contract; that, in the sale of the eastern half of the lot and improvements, *Amos*, and *Fredrick Kent*, who were then the owners of the lot, sold it to *Fitzpatrick, Walker*, as tutor of the minors, sued upon two of the notes of *Fitzpatrick* for the price, and obtained a judgment, in his capacity as tutor, for a special mortgage on the property; that the said property was sold at sheriff's sale, on the 4th of November, 1843, and purchased by *Avery*, who paid the purchase money; that *Avery* afterwards sold to *Monget* for \$600, \$200 cash, and the residue in two notes of \$200 each, and the said tutor has received payment of the said two notes.

It is contended that the judgment and judicial sale in the case of *Monget*, against *Fitzpatrick*, and the receipt by the present tutor, *Pike*, had the effect of annulling the original tacit mortgage of the minors, from the time of *Walker's* purchase in 1838.

1. A mortgage exists without being recorded, in favor of the minors, in the hands of their tutor. C. C. 3298. This positive disposition of the law to the rule laid down in art. 3314, that mortgages shall not prejudice third persons when they have been properly recorded. *Grosillière*, 13 La. 246. *Lessassier v. Dashiell*, 14 La. 174. *Cleveland, tutor, v. Sprovel*, 12 Rob. 174.

2. The second ground is one of much greater difficulty. If the suit was brought had previously been lawfully transferred to the defendant, he would have no hesitation in saying that the defendants would be bound by the judgment and judicial sale, and that the property would be sold free from the legal mortgage; but it is admitted that, at the time of the execution of the judgment, the notes belonged in real estate to the minors, and the embarrassing question is thus presented, whether the

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tutor are to prejudice the minors, in whose name he falsely pretended to act, or the *bond fide* purchasers of property under a judgment and judicial sale clothed with all the forms and solemnities of law.

That honest purchasers without notice, who have paid the purchase money, are not affected by secret equities existing between those under whom they hold or by their misrepresentations and frauds, is a fundamental rule of our system of jurisprudence, and we believe of every other. Against a party thus situated, courts of Equity, where the common law prevails, never give a remedy. "Courts of Equity will not take the least step imaginable against an innocent purchaser in such a predicament, and will, on the other hand, allow him to take every advantage which the law gives him, for there is nothing which can attach itself upon his conscience, in such a case, in favor of an adverse claim." Story's Equity Jurisprudence, no. 1503.

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If the minors are injured by the false representations of the tutor, their remedy is against him and the surety on the bond which he has given for his administration. We are of opinion that the judgment should have been in favor of the plaintiffs in injunction.

It is, therefore, ordered that, the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs in injunction, and against the defendant, with costs in both courts.

BRADFORD v. COOK, Tutor.

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There can be no ratification where there is no title.

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A PPEAL from the District Court of East Baton Rouge, *Burk, J. Lacey and Muse*, for the appellant. *A. M. Dunn*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

Ross, J. The plaintiff married the widow *Alkins*, whose children by her former marriage are the defendants in this suit. Shortly after the death of his wife, he instituted proceedings in the Court of Probates for the purposes: 1st,

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Of withdrawing from the succession his separate property and rights. 2d. Of settling the community which had existed between him and his late wife. 3d. Of making a partition of the property of the succession, among the heirs of both marriages. He alleged that he had expended \$5,000 for the use of the community, and prayed that a final partition be made judicially of the several estates and interests; that the court direct the mode thereof; and that the tutor be condemned to abide the sentence therein to be rendered; that the petitioner, in his own right, have judgment for the amount of his claim against the community; that there be a settlement of said community, and a partition of the succession between the children of the two marriages. The tutor, in behalf of the minors, denied the claim of *Bradford*, and united with him in his prayer for a final settlement and partition of the succession. A judgment was rendered by the Court of Probates disallowing the claim of *Bradford*, on the ground that it was not sustained by legal evidence, settling the other questions at issue, and ordering that the partition of the property should be made in kind, if practicable. This decree was acquiesced in, and is now final.

A motion was subsequently made by *Bradford* to have the decree referred to a notary, and he submitted and filed with his motion an account, which he alleged the notary was to consider before forming the lots, it being for monies expended for the use of the community, and amounting to the sum of \$2,918 74.

At this stage of the proceedings, two of the heirs of *Emeline Cook*, viz: *Mary Mathilda*, at this time married to and aided by her husband *Henry H. Haines*, and *Tabitha Ann*, aided by *Adville Atkins*, her husband, filed their oppositions to the demand of *Bradford*, for various reasons hereinafter mentioned. Subsequently, *Clarissa B. Atkins*, aided and assisted by her husband, *Ballard*, made herself a party to said opposition. They averred, in their opposition, that all matters in contestation between them and the plaintiff had been settled by a final judgment, and that his demand and account could not again be considered. They further averred that, if the decree of the Probate Court was not conclusive as to those claims, they were not valid nor chargeable to the community. The opponents further averred that, subsequently to the rendition of the decree, the plaintiff had been in possession of a tract of land belonging to the community; that his pretended claim to it was fraudulent and unsupported by title. They prayed that the judgment of the Court of Probates might be enforced; the land divided in kind, and the plaintiff made to pay rent for its use and occupation, being a possessor in bad faith.

On this opposition, an order was granted for a stay of proceedings before the recorder,* and the whole matter was returned by that officer to the District Court, for its decision. The plaintiff then filed an answer to the opposition, averring that the experts appointed under the decree of the Court of Probates to decide whether the land was susceptible of division in kind, had reported that it was not, whereupon it had been sold by order of the probate judge, and he had become the purchaser, at a public judicial sale. He further averred that, after the adjudication, the heirs of *Emeline Cook*, defendants in the suit, had acquiesced in, sanctioned, and ratified the proceedings by their legal representatives; that the claims set forth in his account were legal and valid, and that no judgment had ever passed upon them. He finally resisted the pretensions of the defendants for the rent of the land, and averred that he had purchased the same in good

* The notary to whom the decree was referred having declined to act, the recorder of the parish was substituted for him.

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faith and paid for it the sum of \$800; that he had put upon it improvements worth \$2,500; and, in case the sale was rescinded, he prayed that he might recover of the defendants the sum of \$800, with interest, and \$2,500 for improvements.

The District Court sustained the plea of *res judicata*. It also considered that the formalities required by law had not been complied with in the pretended sale of the land, and that it must be restored to the community, and enter into the partition to be affected by the notary. It further held that *Bradford*, being without title, must pay rent. The plaintiff has appealed from this judgment.

The plea of *res judicata* was correctly sustained. All matters of accounts between the plaintiff and the defendants were put at issue in the original suit, and the plaintiff asked a final settlement of the community. The accounts now filed by him bear a date anterior to the institution of that suit, and being for the same object, must be held to have formed part of the sum originally claimed by him. It is urged that the judgment relied on cannot sustain the plea of *res judicata*, because the Probate Court was without jurisdiction to render such a judgment. Courts of Probates had jurisdiction to decide suits on claims for money which were brought against successions. C. P. 924, § 13. The argument that the thing adjudged does not exist, because no evidence was offered on the former trial in support of the plaintiff's claim, is, we apprehend, untenable after the rendition of a final judgment rejecting it. But, moreover, we have no means of ascertaining what evidence was adduced before the Court of Probates, and we are bound to presume that the judge decided correctly.

The next ground upon which the reversal of the judgment is asked is, that the title of the plaintiff to the land in controversy should have been considered valid, and that the property should not have been restored to the community. In presenting this point to our consideration, the plaintiff's counsel admits that the proceedings had in the Court of Probates for the sale of the land are full of gross irregularities, and cannot of themselves sustain title. They contend, however, that the defendants should have failed in their opposition, because they have ratified the title of the plaintiff, and also because they have failed to tender the purchase money.

We concur with the defendant's counsel that there can be no ratification where there is no title, and that the plaintiff has utterly failed to show title to the land. On the trial of the cause, his counsel offered in evidence a writing purporting to be a certificate of adjudication of the land to him, but not signed by the officer who made the sale, and, in connection therewith, the evidence of *Charles Tessier*, alleged to be that officer. He also offered the testimony of other witnesses for the purpose as stated by him: 1st. Of showing the title of the plaintiff to the land in controversy and to authenticate the sale. 2d. Of showing the manner and circumstances under which the plaintiff came into possession of the land, and thereby establishing his right to recover the price paid, and also the value of the improvements. The defendants objected to the introduction of this testimony on the grounds, that Judge *Tessier* was then *functus officio*, and could not authenticate a sale alleged to have been made by him when he was judge of the Court of Probates; and farther that titles to land cannot be established by parol evidence. The court sustained the objection, and the plaintiff took a bill of exceptions.

This evidence was clearly inadmissible to prove title, and no attempt having been made to offer any other, we must come to the conclusion that the land

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never ceased to belong to the community, and that there was no foundation upon which the alleged ratification could rest. But besides, the defendants were minors, and the receipt of a portion of the price of the land by their tutor, could never be construed into a ratification to their prejudice.

The argument that the defendants cannot maintain their opposition and obtain a rescission because they have failed to allege and prove a tender of the purchase money, takes for granted a fact which does not exist, the existence of a probate sale. Where there is no sale, the rule invoked is without application. The record shows that the plaintiff paid Judge *Tessier* \$603, and that the judge, with this amount and other sums in his hands belonging to the minors, took upon himself to pay divers claims alleged to have been due by the succession and the heirs. This account is to be settled between the parties interested and the judge, and forms no part of the present litigation.

The plaintiff alleges that he is a possessor in good faith, not liable to pay rent, and entitled to recover the value of his improvements, and that the evidence offered by him, if not legal to establish his title, should have been received to prove the nature of his possession. This is only alleging, in another form, that it should have been admitted to prove his title, because unless there was a title, he could not prove his possession under it. It is well settled that when questions of title arise in actions of damages, the proof required is the same as in petitory actions. *Patterson v. Bloss*, 4 La. 374.

The possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, or that his title is vicious and defective. C. C. 3415. The evidence in the record satisfies us that the plaintiff comes within this definition, and that he should not be permitted to shelter himself under the alleged errors and negligence of his counsel. The sale for \$603, of property appraised in the inventory at \$9,400, would have been, if it had taken place, an unjustifiable sacrifice. After the experts appointed had reported, without being sworn, that it was not for the interest of the minors to divide this property in kind, a family meeting was convened to fix the conditions of the sale, and, at the instigation of the plaintiff, recommended that the land should be sold for cash, giving as a reason that this was the only way in which the sums expended by him for the community could be refunded. At that time his claim against the community had been rejected by the judgment of the court, and the reason assigned by the family meeting did not exist. The proof that he was himself satisfied he had no claim, results from his present allegation that, as soon as the land had been adjudged to him for \$603, he paid that sum to the succession. He would not have done so if he had been a creditor, as he now pretends to be. We are satisfied that he was properly charged with the rent. The tutor himself could not have made the improvements on the property, and charged the minors with them, without an authorization of the judge rendered on the advice of a family meeting. The plaintiff has not greater power. It is not necessary to enquire whether those improvements have enriched the minors, as the record contains no evidence on that subject.

Judgment affirmed.

SAUNDERS et al., Commissioners &c. v. SMITH, Administratrix.

Under the statutes of 14 and 26 March, 1842, and 5 April, 1843, providing for the liquidation of

banking companies, a debtor to a bank was entitled to give in payment the obligations of the bank, without reference to the date at which he acquired them.

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A PPEAL from the District Court of East Feliciana, *Stirling, J. Ellis*, for the appellants. *Merrick and Roselius*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

EUSTIS. C. J. This suit is brought on a stock note subscribed by *Caswell Smith*, in favor of the cashier of the Clinton and Port Hudson Railroad Company, in February, 1840, payable eighteen months after date. Previous to the institution of this suit the defendant had tendered in payment, by way of compensation, a bond of said company, which was then due, and ten per cent in gold and silver, which was received by the commissioners, but the bond was refused. The amount received was credited on the note. The district judge decreed the compensation to have taken place as pleaded in the defendant's answer, and gave judgment, and the liquidator, who succeeded the plaintiffs in office, has appealed.

The legislature having, by its acts of 1842 and 1843, provided for the liquidation of the banking corporations of the State, whose charters had been forfeited, though no forfeiture had been judicially decreed, established certain rules upon which the commissioners should proceed in effecting the liquidation. One was, that the debtors to a bank might give in payment the obligations of such bank, without reference to the date at which the debtor may have acquired the same. We concur with the late Supreme Court in the opinion that, the rules established under those acts were obligatory upon the officers appointed under them. 6 Rob., 398.

The commissioners for liquidating the affairs of those banks have acted uniformly in conformity with this rule. The subject is one of great difficulty, but we have been able to come to no other conclusion than that the judgment of the District Court is correct. *The Bank of Maryland v. Ruff*, 7 Gill & Johnson, 465.

Judgment affirmed.

YOUNG, State Commissioner of Mississippi, v. CROSSGROVE, Administrator.

Where the maker of a note was, before its execution and until his death, a resident of this State, and his succession was opened, and all of his available property situated, here, the fact that the note was dated and payable in another State, will not, in an action on the note against his succession here, make the case an exception to the general rule that the *lex fori* governs prescription.

A note made payable to certain commissioners, and not to them or their order, though it contain the words "payable and negotiable at the bank of M" " ", at N," is not a negotiable instrument, and, consequently, not prescribed by five years under art. 3505 C. C. *Per Curiam*: The words *negotiable at &c.*, being joined to the word *payable*, must be considered as referring to the place of payment, and perhaps to the currency usual there.

To ascertain whether an instrument is prescribed by our laws, its character must be determined with reference to our own jurisprudence.

A PPEAL from the District Court of Concordia, *Farrar, J.*
H. A. Bullard and Frost, for the plaintiff. *Thomas, Snyder, Stacy and Sparrow*, for the defendant, contended: 1st. That the note was prescribed by six years under the stat. of Mississippi. 2d. That all claims

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against the succession of the deceased person not presented &c., within eighteen months after publication of notice for that purpose, are declared by section ninety-two of the act of 1821 (H. & H. Dig. 413), "to be forever barred, and the estate of the testator, or intestator," "discharged." Administration was taken in Adams county, Mississippi, on the 5th April, 1840, and the printer's receipt, in June, 1840, shows that advertisement had been made. 3d. That the note was made "payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez;" and, as such, is a negotiable note transferable by endorsement, and was prescribed by the prescription of five years. C. C. art. 3505. "In order to make a promissory note negotiable, it is not essential that it should in terms be payable to order or bearer; any other equivalent expression, clearly demonstrating the intention to make it negotiable, will be of equal force and validity." See Story on Notes, s. 44.

The judgment of the court (*King, J. absent,*) was pronounced by

SLIDELL, J. This suit is brought upon a note by which *Harrison, Gibson & Harris*, bound themselves *in solido*. It is dated and payable in Natchez, and fell due on the 5th September, 1839. This suit was brought, and citation was served, in November, 1846.

The defendant relies on three prescriptions: I. The prescription of six years by the laws of Mississippi. This cannot avail him. *Gibson* was, before the execution of the note, and so continued until his death, a citizen and resident of Louisiana; his succession was opened here, and all his available property was situated here. Under these circumstances there can be no reason for making this case an exception to the general rule, that the law of the forum regulates prescription.

II. It is urged that, by the laws of Mississippi, all claims against the succession of a deceased person not presented within eighteen months after publication of notice for that purpose, are declared to be forever barred, and the estate of the testator or intestator discharged. It was very forcibly argued, on the part of the plaintiff, that *Gibson's* succession was opened in Louisiana, the State of his domicile, and in which all of his available property was situated; that the administration subsequently opened in Mississippi was merely auxiliary, and for the purpose of enabling the administrator to prosecute a chose in action there, acknowledged in the petition for letters to be of equivocal value, the pursuit of which was subsequently abandoned, so that not a dollar was ever realized there. Under such circumstances, it would have been a vain thing on the part of the creditor to take proceedings there; and it would seem that his rights against the principal administration in this State should not be affected by his inaction in Mississippi. But however this may be, it is not satisfactorily proved that proper publication was made in Mississippi according to the requisitions of her statutes, and there is, therefore, no legal basis for this branch of the defence.

III. It is said that the claim is barred by the prescription of five years, under article 3505 of our Code. That prescription is applicable to negotiable instruments, and we do not consider the note in question as falling under that denomination. The note is payable to the commissioners of the sinking fund, and not to them or their order. The defendant, however, contends that the negotiable character of the instrument is demonstrated by the subsequent expressions, "payable and negotiable at the Planters' Bank of the State of Mississippi, at Natchez." In this view we do not concur; the expressions, we think, point to the place of payment. They are very common in ordinary notes, which are promissory notes in the proper sense, by being made payable to order. The very frequent use of this phrase in instruments negotiable by their tenor, shows that

the words in question are not commonly used for the purpose of designating the character of the obligation. In that sense they would, as ordinarily used, be surplusage.

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Besides the word, if construed in the sense contended for, would present an anomalous and unusual contract—"negotiable at the Planters' Bank"—that is to say—if you endorse it at the Planters' Bank, the party taking will be an endorsee, but if you endorse it any where else, he will be a mere transferee.

The proper meaning of the expression is best ascertained by the application of the rule *noscitur a sociis*, and, being joined to the word payable, it is to be considered as pointing to the place of payment, and perhaps to the sort of currency usual at the place.

For the purpose of prescription we have construed the character of the instrument with reference to our own jurisprudence. See the case of *Lacoste v. Benton*, 3 An. p. 220.

Judgment affirmed.

BROWN v. STONE.

An action on a promissory note, commenced by attachment against a non-resident maker, by whom the note was executed in the State of A., where he resided, payable in the State of M., cannot be maintained here after the time required to prescribe the note by our laws, on the ground of the claim not having been prescribed by the laws of M. *Per Curiam*: The maker having lived in A. at the time he became a party to the note, plaintiff could not have contemplated his bringing or keeping himself within the jurisdiction of M., and he cannot be considered as having done any act by which his creditor has been prevented from collecting his debt.

The general rule is that, prescription is governed by the *lex fori*.

APPEAL from the District Court of Madison, *Selby, J.*
Thomas and Snyder, for the plaintiff. By the laws of Mississippi, all actions upon instruments of the kind sued on, are barred by the statute of limitations, after the lapse of six years from their maturity. Howard & Hutchison's Digest, p. 569, s. 91. But by the 99th sec. of the same act (page 571), so long as the debtor is not a resident of said State, the prescription remains in abeyance. The debt therefore not being extinguished in Mississippi, we have only to test it by the laws of our own State. By art. 3505 C. C. actions upon bills of exchange and promissory notes are prescribed by the lapse of five years, unless interruption has taken place in one of the modes pointed out by law. Prescription does not run in favor of an absent debtor, nor against those who cannot prosecute their claims. *Stone* has always resided in the State of Arkansas; and he could not be sued either in the State of Mississippi or Louisiana. 7 La. 580. 1 An. 405.

Bemis, for the appellant. The prescription of five years applies to absentees. C. C. 3505, 3506. 15 La. 146. Prescription is governed by the *lex fori*. *Storv's Conflict of Laws*, 2d ed., §577.

The judgment of the court (*King, J. absent*), was pronounced by

ROSE, J. This suit was brought by attachment upon a promissory note of the defendant, who is a citizen of the State of Arkansas, subscribed and made payable in the State of Mississippi. At the time of the institution of this suit more than five years had elapsed after the note became due, and the defence set up is the plea of prescription, under art. 3505 C. C.

The case is before us on the appeal of the defendant, and the only question it presents is, whether the action, not having been commenced within the period prescribed by the laws of Louisiana, can now be maintained under the statute of

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limitations of the State of Mississippi. As the defendant lived in Arkansas at the time he became a party to the note, the plaintiff did not contemplate that he should bring or keep himself within the jurisdiction of Mississippi, and he cannot be considered as having done any act by which his creditor has been prevented from collecting his debt.

Under the circumstances, we consider the defendant as protected by art. 3505, the general rule being that the law of the forum governs the prescription of actions. *Newman v. Goza*, 2 An. 642. Story, Conflict of Laws, § 576, 577. *Union Cotton Manufactory v. Lobdell*, 7 Mart N. S. 108.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

EX PARTE BARRETT.

Decision in *Stanton v. Parker*, 2 Rob. 550, affirmed.

APPPLICATION for a Mandamus to *Buchanan*, Judge of the Fifth District Court of New Orleans. *Sever*, for the applicant. No other counsel appeared in this case. The judgment of the court (*King*, J. absent,) was pronounced by

SLIDELL, J. For the reasons assigned in the case of *State v. Judge Buchanan*, 13 La. 576, and *Stanton v. Parker*, 2 Rob., 550, it is ordered that the writ of mandamus prayed for in this case be refused, at the applicant's costs.

THE UNION BANK OF LOUISIANA v. JONES.

The board of directors of the branch of the Union Bank at Covington, being clothed by the stat. of 9 April, 1832, incorporating the bank, and by the rules and regulations adopted by the board of directors of the mother bank, with such powers only as the charter expressly granted, or such as were necessary and incidental to the accomplishment of the objects contemplated by the charter, in establishing an office of discount and deposit at that place, were limited agents, unauthorized to make a donation of the property of the stock-holders; consequently, where the maker of a note owned by the bank made a *cessio bonorum*, the board of directors of the branch could not authorize the cashier to vote for his discharge, thereby abandoning all claim against the insolvent in the event of his coming to better fortune, and discharging the endorser. The bank having acquired a right to a dividend whether a discharge was voted or not, the vote was purely gratuitous—a mere donation, and not binding on the bank.

A third person can derive no benefit from an usurpation of power by an agent on whose acts he relies, where such usurpation was known to him.

Decisions in *Union Bank v. Jones*, as to the certificates of notice of protest, *ante* p. 220, affirmed.

APPEAL from the District Court of St. Tammany, Penn. J. *Halsey*, for the appellants. The directors of the branch were themselves without authority to grant a discharge. They were agents, having only a power of administration, and could not remit a debt, for remission is an act of ownership. *Union Bank of Louisiana v. Bagley*, 10 Rob. 43. Pothier, Oblig. 619. Mandat, 164. C. C. art. 630. The charter, s. 34 (Acts 1832, p. 68,) provides "that there shall annually be appointed by the board of directors of the Union Bank, to administer (*pour administrer*) the affairs of said offices of discount and

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deposit, five or seven directors." The expression "to administer" is employed in our law in contradistinction "to use as owner." We derive the term from the french law, where it is used in the same acceptation. There are many familiar instances of this employment of the word. I will note only that in art. 2965 of the Code, defining the effect of the mandate in general terms, and that of the express mandate. It seems reasonable to infer from the use of a term of this received meaning, to define the object of the appointment of the directors of the branches, that the legislature has given them the power of general agents—a power of administration, the transaction of the ordinary business of the offices, the care and safe investment of the capital. That this construction gives the intention of the legislature is plain, from other features in the charter. Section 2 provides "that the deliberations of the board of directors of said corporation (the mother bank) shall have the same force and effect as the deliberations of the stock-holders." Sec. 34 makes the directors of the branches subject "to all such regulations and rules as may be adopted by the board of the mother bank for the government of said officers." The board of the mother bank is composed necessarily of stock-holders, (s. 10); the directors of the branches are not required to be stock-holders; besides, the board of the mother bank appoints the directors of the branches. The first is a body of owners having a right in themselves, and an interest at stake. The second are creatures of the first, deriving all authority from their appointment, and have no interest whatever. The first are principles, the second mere agents. The proximity of the branches to the mother bank, the facility of communicating with it, create a presumption that it was contemplated by the legislature that for all transactions out of the usual course of business, the directors of the branches should consult the board of the mother bank. "Lorsque le mandant n'est pas assez éloigné pour que son procureur ne puisse facilement le consulter sur ses affaires *extraordinaires* qui peuvent survenir, la présomption est que le mandant par la procuration générale qu'il lui a donnée n'a entendu le charger que de ses affaires *courantes et ordinaires*, qui ne souffrent pas de difficulté." This rule expresses a reservation most reasonably implied in the trust to every agent.

"If the powers of such attorneys or officers have not been expressly determined, they are regulated in the same manner as those of other agents." C. C. 430. If the charter be not sufficiently explicit, we must ascertain the powers of the directors of the branches from the rules of the law of mandate. The powers of the directors being given "in general terms, confer only a power of administration." "The power must be express and special in general, where things to be done are not merely acts of administration, or such as facilitate such acts." C. C. 2965, 2966. Pothier, Mandat, 148. "Cetleuq' étendue que soit une procuration générale, elle ne donne pas au procureur le pouvoir de disposer par donation d'aucune chose des biens dont on lui a donné la gestion. C'est une conséquence de ce principe, que le procureur omnium bonorum n'a pas le pouvoir de faire une remise gratuite de quelque droit qui appartiendrait au mandant, une telle remise lorsqu'elle est gratuite, étant une véritable donation." Pothier, Mandat, 164. Olig. 619. The only instance of remission within the power of the general agent is that given from necessity, of a part of the debt in order to preserve the rest of it. "La remise d'une partie de la créance pour se conserver le surplus, et dans la crainte de perdre tout. Elle ne se fait pas tant animo donandi, que dans l'intention de s'assurer par ce moyen le paiement du surplus de la dette et de ne pas tout perdre." It may well be doubted whether even the directors of the mother bank can give a discharge, without the consideration of an advantage. But it is certain that the directors of a branch cannot. This discharge was not necessary to enable the bank to participate in the proceeds of the insolvent's estate. The discharge was gratuitous. C. C. 2173.

No presumption of a ratification of the discharge, which the defendant may derive from the recognition by the board of the vote of the cashier in other respects, can avail the defendant. The ratification cannot be implied—it must be express. C. C. 2990.

Jones, pro se. The holder of the note sued upon, not having preserved his rights unimpaired against the maker, the endorser is discharged. See Civil Code, arts. 3030, 3032. *Loddell v. Niphler*, 4 La. 294. *Hereford v. Chase*, 1 Rob. 212. *Callahan v. Tanner*, 3 Rob. 299. *McGuire v. Wooldridge*, 6 Rob. 47. *Gustine v. Union Bank*, 10 Rob. 412. *Freeman v. Profflet*, 11 Rob. 33. *Bank of the United States v. Hatch*, 6 Peters' U. S. Rep. 250. *Chitty on Bills*, 299, 305.

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The cashier of the branch, *Read*, had a right to do every thing within the scope of his authority, without any special authorization, according to the general usage, practice and course of business of such institutions; and such acts are binding on the bank. The cashier is the executive officer of the bank, through whom and by whom the whole monied transactions of the bank, in paying or receiving debts, and discharging or transferring securities, are to be conducted. He is entrusted with all the funds of the bank in cash, notes and bills, and other securities, to be used, from time to time, for the ordinary and extraordinary exigencies of the bank. And any restrictions upon his authority, with regard to the disposal of the notes and bills belonging to the bank, must be established by competent proofs, and will not be presumed to exist. See *Story on Agency*, secs. 16, 52, 53, 114. *Minor v. Merchants' Bank of Alexandria*, 1 Peters' U. S. Rep. 70. C. C. art. 429, 430.

Even if *Read* had not been cashier, he had possession of this note endorsed in blank, which gave him the legal title to it as owner, and with it he appeared before the notary, and his authority to controul the proceedings to that amount could not be questioned. The delivery of a note endorsed in blank to an agent, invests him with all the authority respecting the disposal of the note that could be conferred by power of attorney. *Story on Agency*, s. 104. *Chitty on Bills*, p. 147. *Story on Bills*, s. 207. *Conrey v. Elbert*, 2 An. 18. *Succession of Nicolas*, 2 An. 97.

If there should remain any doubt as to the authority of *Read*, that doubt is removed by the conduct of plaintiffs, which amounts to a ratification. His acts having been notified to the corporation, no objection was made. It has recognized the selection of syndic, has controlled his administration and received the dividends. Having acquiesced in the acts done in its name for nearly six years, received the benefits of so much of the acts of the agent as was favorable, still retaining that agent in its employ, it is now too late to disapprove of the part deemed unfavorable. C. C. art. 2252. *Story on Agency*, s. 90, 93, 244, 250, 260. 1 *Livermore on Agency*, p. 44, 53. *The Episcopal Charitable Society v. The Episcopal Church in Dedham*, 1 Pick. 372. *Reid v. Powell*, 11 Rob. 98. *Elam v. Carruth*, 2 An. 275.

The cases reported in 10 Rob. pp. 43, 47 of *The Union Bank v. Bagley*, and *Bagley v. Tate*, no doubt induced the plaintiff to commence the present suit; but the nature of the claims enforced in those suits were entirely different from the present. The claims that were opposed by *Bagley* belonged to the parent bank, they were not under the administration of *Read* in his capacity of cashier of the branch, and it was not shown on the trial that he had any authority to represent that bank. Had that authority been shown, it would not have varied the result; because those claims were founded on special mortgages, executed by *Terrell* on property which he afterwards sold to *Bagley*, subject to the mortgages, and in violation of clauses in them. *Read*, when he appeared before the notary, discharged *Terrell*, but reserved the rights of the bank on the mortgaged property; and the bank in those suits only sought to enforce those rights. It did not disavow the acts of *Read*, as their agent, but sought only to enforce the stipulations he had made in their favor.

The judgment of the court* (*King*, J. absent,) was pronounced by

SLIDELL, J. The defendant, who is sued as the endorser of a note discounted and held by the branch of the Union Bank at Covington, contends that he has been released from all liability, by reason of the voluntary discharge of the maker. *Terrell*, the maker of the note, had made a *cessio bonorum*. At the meeting of his creditors the cashier of the bank appeared, and voted a discharge of the insolvent. It does not appear that any authority to do so had been given by the mother board, nor does any resolution appear on the minutes of the branch board; but a witness, who was at that time a director of the branch, states that, to the best of his knowledge and recollection, the board of directors of the Covington branch requested the cashier to attend the meeting, accept the surrender, and grant a discharge. We do not deem it necessary to say whether this evidence

* EUSTIS, C. J., though a stockholder of the Union Bank, sat on this case, at the request of the defendant.

was admissible, and if admissible, whether it proved that a resolution of the branch board was passed authorizing the cashier to give the vote. Assuming, then, that there was such a resolution, we shall limit ourselves to the enquiry, whether it, and the act of the cashier under it, were binding on the corporation.

It is obvious that the discharge was a mere donation. *Terrell* had made a *cessio bonorum*; and the bank had acquired a right to a dividend, whether a discharge was voted or not. The vote, therefore, was without consideration, and purely gratuitous. If binding, it was an abandonment of all future claim against the insolvent, in the event of his coming to better fortune, and by consequence, a discharge of the endorser. It gave up the property of the stockholders, without any value received.

When the directors proper of a corporation gratuitously destroy, or give up its property or rights, there can be no doubt they will be personally liable to stockholders for all consequent injury; but whether such an act could be invoked by a third person as binding upon the corporation, we do not think it is indispensable now to discuss. We will confine ourselves to the examination of the question directly presented here—the authority of the board of this branch so to affect the rights of the corporation; premising that the incapacity of the cashier, *virtute officii*, is clear. See *The Union Bank v. Bagley*, 10 Rob. 43.

The management of this corporation was placed by the charter in the hands of directors; but to the usual powers was superadded the unusual grant, that the deliberations of the board of directors shall have the same force and effect as the deliberations of the stockholders. But the language of the charter is very different when it comes to speak of the branch boards. After providing for the establishment of eight offices of discount and deposit, at various points out of New Orleans, the seat of the corporation itself, it provides that there shall be annually appointed by the board of directors of the Union Bank to administer the affairs of said offices of discount and deposit, five or seven directors, three of whom shall constitute a quorum; and said directors shall choose from among themselves a president, and shall be subject to all such regulations and rules as may be adopted by the board of the mother bank for the government of said officers, not inconsistent with the provisions of this charter. By sec. 35, provision was made for the appointment by the mother board of cashiers of those officers of discount and deposit, who were to furnish such security as may be required by the mother board. By the 30th section it was enacted that the directors of said offices of discount and deposit shall appropriate two-thirds of the capital of such offices to loans on mortgage, and one-third to loans on promissory notes or bills of exchange, and they were authorized to loan or discount upon notes secured by mortgage. By the 39th section, the rate of interest upon loans by these offices was established; and by the 40th section power was given to the mother bank to withdraw the country offices, in the event of their operations respectively not netting over a certain rate of interest.

No grant of power to the office at Covington, in the form of rules and regulations adopted by the board of the mother bank, having been shown, we must look to the charter alone for the powers of the Covington board; and, under the charter, we cannot consider them as vested with an unqualified control—the *jus utendi et abutendi*, but as limited agents, clothed with such authority only as was expressly granted by the charter, or was necessarily incident to the accomplishment of the objects contemplated by the charter in using a certain portion of the capital of the bank for loans and discounts, and keeping an office of deposit as therein provided. The power of making a donation of the property of the stock-

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holders, which, if we hold the discharge valid, has been virtually exercised in the gratuitous release of *Terrell* and of the defendants, was not, we think, within the legitimate sphere of their authority.

The defendant has not shown that he has been in any wise injured by the attempted discharge of *Terrell*; but if he had been reduced into inactivity against *Terrell* by the conduct of the board, the responsibility cannot be thrown upon the principal of the agents who thus usurped authority. The power of the Covington board was the creature of a statute, and as such was known to the defendant; and a party can derive no benefit from the known usurpation of power by the agent on whose acts he relies.

The note appears to have been properly protested, and the objection made to the certificate of notice, was considered and overruled in the case of the *Union Bank v. Jones*, ante p. 220.

It is, therefore, decreed that, the judgment of the court below be reversed, and that plaintiffs recover from the defendant the sum of \$540, with interest from the 26th day of April, 1842, until paid, at the rate of seven per cent per annum, and costs in both courts.

DWIGHT v. RICHARD.

A new trial will not be allowed on account of the absence of plaintiff's attorney, caused by the ignorance of the latter of the month in which the term of the court was to be held, where the commencement of the term was fixed by law, and the plaintiff was in the parish in which the court was held and aware of the day on which the term would commence, and might have appeared and asked a continuance, and, if unsuccessful, have employed other counsel.

The fact that no return had been made on an *ex parte* order of survey, at the time of trial, is no ground for a new trial. It was a matter to be submitted to the discretion of the court on an application for a continuance.

The fact of a case being set for trial and tried on the same day, in a district court in the country, will not entitle a party to a new trial. It is a matter to be submitted to the discretion of the court, on an application for a continuance.

Where a judgment bearing interest has been enjoined, such additional interest only can be allowed, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest.

The judgment rendered against a plaintiff on his non-appearance, should not be conclusive against him, but one of non-suit only.

Sec. 3 of stat of 25 March, 1831, authorizing the allowance of interest and damages on the dissolution of an injunction, applies to injunctions of orders of seizure and sale in other cases than those enumerated in art. 739 of the Code of Practice, in which the party is not required to give bond.

APPEAL from the District Court of Assumption, *Randall, J. Dwight*, for the appellant. *S. L. Johnson*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. *Richard* sold *Dwight* his interest in a tract of land, One of the instalments not being paid at maturity, *Richard* obtained an order of seizure and sale. *Dwight* then arrested the order by injunction, alleging outstanding titles and disturbance, etc. An order of survey was granted, in March, 1848, on *Dwight's ex parte* motion, and upon suggestion that a survey was necessary to

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show the quantity of land covered by adverse claims. On the second day of the May term, 1848, the defendant's counsel moved that the cause be set for trial for that day. This having been done, the cause was taken up on that day; and, the plaintiff having been called and not appearing, a judgment was rendered in favor of the defendant in injunction, with two per cent interest in addition to the interest which the amount enjoined bore, and twenty per cent damages. On the third day of the term the plaintiff applied for a new trial, supporting his application by the affidavits of himself and his attorney. The new trial was refused; and the plaintiff has appealed.

The principal ground of the application is, the absence of the attorney. The plaintiff deposes that his attorney, who lived in another parish, had the sole charge of the case; that he wrote to him on the 9th and 14th May, urging his punctual attendance; but that his attorney did not receive the letters until the 16th. The attorney deposes that he had been under the impression that the term was to be held in June, but not feeling certain that it was not to be in May, he wrote, on the 2d May, for information, and received from his client, on the 16th, the two letters. That he immediately started, and, by traveling day and night, was enabled to reach the court on the third day of the term.

Although there seems to be hardship in this case, we have concluded that we cannot relieve the plaintiff by reversing the judgment and remanding the cause for a new trial, without establishing a dangerous precedent. The rules which govern courts in the administration of justice are framed with reference to general results, and must be respected and enforced, although, in particular cases, they may operate harshly. We do not think we can relieve this party, because his case was taken up, and disposed of, *ex parte*, through the mistake of his attorney. The term of the court was established by statute; the attorney and his client were bound to know the law, and cannot plead ignorance of it. Besides, the plaintiff was in the parish, was aware of the day on which the court would open, and was anticipating the necessity of readiness for trial. Finding that his attorney did not arrive, he could have appeared and asked a continuance, and, if unsuccessful, could have employed other counsel.

In *Bunch v. Casterton*, 7 Bingham, 224, the cause was undefended; and a verdict having been found for the plaintiff, the defendant asked a new trial upon the ground that his attorney had been compelled to go to Ireland, and that, in his absence, the case had, through the inattention and misconduct of his clerk, been called as an undefended case, although there was good defence on the merits. But the court said, if we were to make this rule absolute every case might be tried twice over, as defendants would lie by to speculate on the amount of the first verdict. So in *Moody v. Dick*, 4 Neville & Manning, 348, there was a motion for a new trial, upon affidavits stating that the defendant had been kept in ignorance of the state of the action by the attorney whom he then employed, that he had a good defence upon the merits, and that the verdict had gone against him by reason merely of the negligence of his late attorney. But the court said, that no sufficient ground for depriving the plaintiff of his verdict had been shown, supposing the affidavits to be perfectly correct. They suggested, however, upon the same supposition, that the defendant might have a good cause of action against his late attorney. See also *Allen v. Donnelly*, 1 McCord, 113. *Hatcher v. Reed*, Hardin, 515. The case of *Levistones*, 3 An, 245, was one apparently of peculiar hardship; the party lost his appeal by the alleged fault of his attorney, but was were constrained to refuse relief.

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It is obvious that if courts were to abandon the rule, the administration of justice would be frequently frustrated under color of the negligence or omissions of attorneys; and the inconvenience would be particularly felt in the country, where the terms are held at long intervals. We feel satisfied that the attorney in this case was not intentionally absent; but there are many cases in which the private mischief must yield to the general convenience.

One of the grounds for the new trial was that the survey was not returned. But this would only have been a ground to be submitted to the discretion of the court, on an application for a continuance. The same remark applies to the setting of the cause for trial, and trying it on one and the same day.

Upon the authority of the case of *Aillet v. Henry*, 2 An. 146, we think the appellant is entitled to relief as to the allowance in the judgment of two per cent as extra interest, the debt bearing eight per cent.

As the judgment was rendered upon the non-appearance of the plaintiff it should not have been conclusive against him, as it might, perhaps, be considered in its present form.

We are of opinion that the statute of 1831 applies to injunctions of orders of seizure and sale in cases other than those enumerated in the 739th article of the Code of Practice, in which the party is dispensed from giving bond.

Under the circumstances we think it a proper exercise of our discretion to reduce the damages, the merits having not yet been exhibited, and it not appearing that the injunction was wantonly obtained.

It is, therefore, decreed that the judgment be amended, by striking out the allowance of extra interest of two per cent, by reducing the damages to two per cent, and by reserving to the plaintiff the right of asserting hereafter by suit or defence the matters of complaint in his petition alleged; and that so amended the judgment be affirmed; the costs of this appeal to be paid by said *Richard*.

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GUILLOTTE v. JENNINGS.

The remedy by a sale *à la folle enchère* is a severe one, and must be confined to cases coming clearly within the provisions of the law.

Art. 2590 of the Civil Code contemplates that the terms of the sale *à la folle enchère* shall be the same as those of the first adjudication; and where an auction sale was made for a price payable partly in cash and the balance on credit, but, on a re-sale *à la folle enchère*, the property was offered and sold for cash only, the difference between the price of the first and second sale will not be considered a just measure of the injury sustained in consequence of the first purchaser's failure to comply with this contract; nor will it make any difference that the change was attributable to delays produced by the failure of the first purchaser, during which the note, which was to have been assumed for the credit part of the price, matured.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Basisson*, for the plaintiff. *Bradford*, for the defendant. The judgment of the court (*King, J. absent*.) was pronounced by

SLIDELL, J. The remedy through the medium of the *folle enchère* has been properly characterized as "summary and severe," and from this consideration the conclusion is fairly derived that it ought to be confined to cases clearly coming within the provisions of the law, and in which its requisitions have been observed. See *Second Municipality v. Hennen*, 14 La. 586.

Article 2589 C. C. seems to us to contemplate that the terms of the *folle*

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enchère shall be the same as those of the first adjudication. In the present case they were not the same. At the sale to the defendant, made on the 23d May, 1843, the terms were that the purchaser should assume the payment of a note for \$640 due in June, 1844, and the balance cash. At the *folle enchère* the terms were cash.

The plaintiff contends that the change was attributable to the default of the defendant; that he delayed the plaintiff until the note which was to have been assumed had matured. But this is not an answer to the objection. The law gives three remedies against the defaulting purchaser, the action for specific performance, the ordinary action for damages, and the action based upon the *folle enchère*, which itself liquidates the damages, if properly conducted. If the seller choose the latter remedy, he must take it as it is given, or not at all. When both sales are made upon the same terms the difference is not an inequitable standard of the injury sustained by the defendant's failure to fulfil the contract. But when the terms are changed, a new element is introduced to affect the result; for daily experience teaches us that, in consequence of the deficiency of capital, and the necessity of the buyer's reliance in some degree upon the efforts of his future industry, sales of real estate are made more advantageously, in point of price, upon credit than for cash. Here the property was sold upon a partial credit, in May, 1843, for \$1,375, and for cash in August, 1844, for \$660. We cannot say that this discrepancy was not in some degree owing to the difference of terms; and the inflexible standard of the *folle enchère*, by which we are called upon to measure the defendant's liability, is consequently, in the present case, unsafe and untrue. Had the remedy been pursued according to the requisitions of the law, judicial discretion would have been excluded by a conclusive legal presumption. As it was not, the legal standard has not been created, and there is no basis for the present suit.

Entertaining this opinion, we have deemed it unnecessary to consider the question of the effect of the lapse of time upon the plaintiff's right to proceed by the *folle enchère*, and other points made by the defendant.

It is, therefore, decreed that the judgment of the District Court be reversed, and that there be judgment as in case of non-suit; the plaintiff paying costs in both courts.

LAGRAVE et al. v. FOWLER.

Where one, who had contracted to furnish marble for a building within a time fixed, finds it impossible, in consequence of the inundation of his quarries and marble works, to comply with his contract within the time specified, is permitted by the other party to furnish the materials afterwards, the latter must pay for them.

Where one, who had been unable to comply with a contract to furnish materials at a certain time, and who is permitted to furnish them afterwards, claims in his petition the original contract price, but, in a supplemental petition, demands a larger sum on a *quantum meruit*, the amount claimed in the petition will be considered as fixing the price for which the contract was to be performed after the period originally fixed for its performance.

APPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Rozier, Benjamin and Micou*, for the plaintiffs. *Grymes*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

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EUSTIS, C. J. The plaintiffs brought suit against the defendant, for the sum of \$4,261 61. Of this amount \$3,500 was claimed under a contract made between the parties in New Orleans, on the 5th of June, 1844, by which the plaintiffs bound themselves to furnish and put up the granite and marble work required for three new buildings, to be erected at the corner of Magazine and Natchez streets, in the city of New Orleans, for the said sum of \$3,500, according to the conditions stipulated particularly in said contract; the balance was for extra work done at the instance of the defendant. The answer alleges that the work was badly done, that unfit and improper materials were used, and that the contract has not been complied with on the part of the plaintiffs, either as to the material, workmanship, or the time stipulated for its execution. It also claims the sum of \$600 per month, for the delay on the part of the plaintiffs in performing the contract, from the 15th September, 1844, until the buildings were completed, and a large amount as special damages.

The suit was instituted in 1845, and in April, 1846, a jury found a verdict for the plaintiffs for the sum of \$3,741, and against the defendant on his reconventional demand. On an appeal taken by the defendant this court directed a new trial to be had, being of opinion that, under the pleadings and evidence, the verdict could not be sustained; and the case was remanded accordingly.

On the return of the cause to the District Court the plaintiffs filed a supplemental petition, in which they allege that the work done and materials furnished were so done and furnished at the special instance and request of the defendant, and were worth the sum of \$10,000, and that the front of the building was completed between the months of September, 1844, and May, 1845, under the superintendence of the architect of the defendant, employed by him for that purpose. Some new evidence was offered on the trial, and a jury again found a verdict against the defendant on his plea in reconvention, and gave the plaintiffs the sum of \$3,500, with interest from judicial demand. From the judgment rendered in accordance with this verdict, the defendant has appealed.

The buildings were not in a condition to be delivered until late in June, 1845, and it is not insisted that the work to be done by the plaintiffs in making the fronts, was completed before the month of May of that year. We think the plaintiffs were prevented from complying with their contract at the time specified, to wit, the 15th September, 1844, by the inundation of their quarry and marble works by the floods of the Mississippi and Missouri rivers, in that year. The condition of time became thus impossible, and the defendant, by permitting the plaintiffs to furnish their labor and materials afterwards, bound himself to pay for them.

It appears that the plaintiffs had, in their petition, asked no more from the defendant than the original contract price for their work, and the jury have held them to that amount, notwithstanding their claim, as urged in their supplemental petition, on a *quantum meruit*. The jury were authorized to act on the allegations of the petition as fixing the price upon which the contract was to be performed, after the time fixed for its performance, viz. 15th September, 1844; and we do not feel authorized to allow the plaintiffs any thing more, though the amount allowed the plaintiffs by the verdict we consider as far short of doing them justice.

Judgment affirmed.

ELLIS et al. v. LAUVE et al.

In an action on a note signed by A., by which he promises to pay a certain sum, he appearing on the face of the note to be the only party liable for its amount, instituted against A. and another alleged to be part owner of a steamer for the price of which the note was given, A. cannot be sworn as a witness, at the instance of plaintiff, to establish the liability of his co-defendant as a partner with him. He is incompetent on account of interest.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge J. T. A. Clarke, Benjamin and Micou*, for the plaintiffs. *Sigur and Bonford*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. This suit is brought upon two notes of similar tenor. One of them is in these words :

\$1,202 45.

"Cincinnati, July 1, 1845.

"Nine months after date we promise to pay to the order of *S. W. Hartshorn*, twelve hundred and two 45-100ths, value received, payable at the office of *Omer Lauve, Esq.*, N. Orleans.

DIMITRY & PLAISANT."

The petition alleges that *Dimitry* and *Plaisant*, were the agents of the defendants, and had been employed by them to have the steamer built, *D.* and *P.* being also part owners; that, at the request of the agents, *Hartshorn* built the hull of the boat, and received the notes for that consideration, but not in novation of the claim for building; that the plaintiffs, as holders of the notes, are subrogated to the rights of *Hartshorn*.

At the trial of the cause, the plaintiffs offered *Dimitry* and *Plaisant* as witnesses. The defendant objected to them as incompetent, by reason of interest; but the court admitted them, and the defendants took a bill of exceptions. This testimony is indispensable to the maintenance of the judgment of the court below, which was in favor of the plaintiffs. Without this testimony, there is no sufficient evidence to connect the notes with the building of the hull by *Hartshorn*, nor to show the value of the work alleged to have been done by him. It is necessary, therefore, to decide the question of competency.

Before doing so, it is proper to notice the other evidence in the cause, which preceded the introduction of those witnesses, and which, the plaintiffs contend, prepared the way for their admissibility.

The plaintiffs had offered articles of partnership, executed by the defendants, by which it was agreed that a steamer should be built, to ply on the Mississippi as a packet. *Lauve* was to be the steamer's agent, at New Orleans; *Dimitry* her captain; and *Plaisant*, the clerk. No partnership name was designated in the articles. It was also proved that *Dimitry* and *Plaisant* had gone to Cincinnati to have the vessel built; and, with authority from *Lauve*, to draw bills upon him for the cost. A letter to the like effect had been addressed by three of the stockholders to a party at Cincinnati, who states that he does not know that he showed it to *Hartshorn*, but that he informed *Hartshorn* that, the parties in Louisiana who wrote it were in high credit. That *Hartshorn* built the hull at the request of *Dimitry* and *Plaisant*, and that he must have known that they were not the sole owners, is also proved.

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It is obvious that, on the face of the notes, *Dimitry and Plaisant*, are the only parties liable, or proposed to be bound. The case in this respect differs from that of *Knight* against the same defendants, 3 An. p. 64. There the note purported to be the promise of the "Steamer Belle Creole and owners."

This case is, therefore, one in which the plaintiffs call witnesses, who are *primâ facie* alone liable to them for the debt, for the purpose of throwing that liability upon others, as partners with them. An interest thus exists in the plaintiffs' success, which compels us to consider them incompetent. Cases there may be which, upon principle, might seem to countenance the opposite view; but after much examination we have not found a single case where, under the circumstances presented here, the witness was admitted. It is not necessary to go into a full statement of the decisions. They may be seen on reference to *Collins v. Ellis*, 21 Wendell, 401. See also the case of *McIlvain v. Franklin*, 2 An. 662. *Cutter v. Rathbun*, 3 Hill, 579.

It was suggested in argument on the part of the plaintiffs, that the names signed to the notes, *Dimitry & Plaisant*, might be considered the partnership name and style of the defendants. This proposition is not substantiated by the evidence. We have already observed that no name was adopted in the partnership articles; and it is not shown that the name in question was so assumed, recognized, and publicly used, as to become the legitimate name and style of the firm.

It is therefore, decreed that, the judgment of the court below be reversed, and that this cause be remanded for further proceedings according to law; the plaintiffs paying the costs of this appeal.

NIBLETT v. SCOTT.

After a case has been submitted on the merits, it is too late for the appellee to contest the correctness of the certificate of the clerk that the transcript contains all the evidence offered on the trial. The objection cannot be considered after the implied acquiescence of the appellee in the correctness of the certificate.

A judgment rendered by a Circuit Court of the United States in another State, cannot be treated as a foreign judgment. It is entitled to the same respect, and must have the same effect, as though rendered by a state court of that State, of competent jurisdiction.

Where a defendant, who has been personally cited in an action, fails to appear, personally or by counsel, and neglects to set up grounds of defence then existing, it is his own *lackes*, and he cannot be relieved from its effects.

APPEAL from the District Court of Madison, *Selby, J. Stockton and Steele*, for the plaintiff. *Thomas and Snyder*, for the appellant. The judgment of the court (*King, J. absent*,) was pronounced by

SLIDELL, J. The plaintiff sues upon a judgment rendered in his favor against *Scott*, in the Circuit Court of the United States for the Southern District of Mississippi, and avers that, by the laws of the State of Mississippi in force at the rendition of said judgment, he is entitled to interest on its amount, at the rate of eight per cent per annum from the day of its rendition. He had judgment in his favor accordingly in the court below.

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The clerk's certificate states that the transcript contains all the evidence adduced at the trial. The judgment of the Circuit Court of the United States is silent as to interest after its rendition, and the transcript exhibits no evidence to prove the law of Mississippi to be as alleged in the petition. As our own law would not give such interest, we must necessarily reverse the judgment of the District Court.

In a supplemental brief presented by the plaintiff's counsel, after the cause had been submitted upon the merits, the clerk's certificate that the transcript contains all the evidence is impeached; and it is argued that the certificate should be disregarded, because it does not appear that the clerk had been required to note the testimony at the trial. The objection cannot be considered after the implied acquiescence of the plaintiff in the correctness of the certificate.

To facilitate the future trial, we will express our opinion as to the effect of the judgment upon which the suit is brought, and which is attacked by the defendant in his answer. Among other matters, he pleads that he never employed counsel for the purpose of defending the suit in the United States Court; that the note upon which said judgment was obtained was given in consideration of a loan of bank notes of various banking corporations of the State of Mississippi, which notes were not worth at the time of the loan over seventy five cents on the dollar; that so the consideration of the notes was usurious, and, by the laws of Mississippi, all usurious contracts are prohibited from bearing interest; that the respondent, never having employed counsel to defend the suit, is not estopped from pleading any and all defences against this action that he could plead were this suit instituted upon the original note. This plea was accompanied by an affidavit that he had not employed the attorney. It appears from the exemplification of the record of the United States Court that, the suit was upon the defendant's note, bearing six per cent interest from its date; that the defendant was duly summoned in that suit, in April, 1840, by a summons commanding him to appear in May, 1840; and that, a plea of the general issue having been filed by persons purporting to be his attorneys, the cause was tried, in November, 1841.

A judgment rendered by a Circuit Court of the United States, is not to be treated as a foreign judgment. *Barney v. Patterson*, 6 H. & J. 182. It is entitled to as high respect here, as though it had been rendered in a state court in Mississippi, of competent jurisdiction. We consider ourselves bound to give this judgment the same effect that it would have before a Circuit Court of the United States, or, before a state court in that State. In this case, the defendant was personally summoned, and brought under the jurisdiction of the court, and if he did not appear and set up the grounds of defence which he now alleges, it was his own *laches*. A court of chancery would not relieve him after verdict and judgment at law, where it was in his power to defend himself at law, and he neglected to do so.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for a new trial, the plaintiff paying the costs of this appeal.

ROGILLIO et al., Administrators v. SWIFT et al.

Where, before the reorganization of the judiciary under the constitution of 1845, a defendant

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died pending an action in a District Court, the case was required to be sent to the Probate Court in which his succession was opened. A judgment subsequently rendered by the District Court, against the executor, who had become a party to the action, would be without effect, that court ceasing to have jurisdiction; and no action could be maintained against the heirs on a judgment so obtained.

APPPEAL from the District Court of West Feliciana, *Lawson, J. Muse, Merrick and Brewer*, for the plaintiffs, contended that, the executor had a right to make himself a party to the action in the District Court. He could even have acknowledged the debt. C. P. 120, 161. *Henry v. Key*, 12 La. 214. *Morgan v. Morgan*, 2 Wheaton, 290.

Ratliff and Cowgill, for the defendants, appellants. The District Court was without jurisdiction from the moment of *Swift's* death, his succession being administered by his executor in West Feliciana. See Code of Practice, arts. 606, 923, 983, 984, 986. C. C. art. 1105. *Succession of Ludewig*, 3 Rob. 92. *Picou v. Dussau*, 4 Rob. 412. Acts of 1828, p. 156. *Fleming v. Hilligsberg*, 1 Rob. 77. *Succession of Jacobs*, 5 Rob. 270. *Kerr v. Kerr*, 14 La. 177. *McManus v. West*, 18 La. 41.

The executor could not, by appearing and answering in the District Court of East Baton Rouge, give that court jurisdiction, as he was acting under the authority of the court of Probates of West Feliciana. No consent of parties can give jurisdiction to a court that has no jurisdiction *ratione materiae*. See cases cited above, 11 Rob. 77. C. P. 93, 933. 14 La. 177.

The judgment of the court (*King, J.* absent,) was pronounced by

Euris, C. J. This appeal is taken by certain heirs of *John Swift*, deceased, who died in the parish of West Feliciana, where his succession was opened and administered by an executor.

The action is brought on a judgment rendered in 1839, in the District Court sitting in the parish of East Baton Rouge, to which the executor became a party defendant. Under the decisions of the late Supreme Court, we think the District Court was without jurisdiction. In addition to the cases cited by the counsel for the defendants, see *Smith v. Willson*, 2 La. 256. *Bullard v. Andrews*, 10 La. 219.

The suit in which the judgment was obtained had been instituted against *Swift* in his life time. The Supreme Court held in the case of *Greigh v. Mug-gah*, 11 La. 357, that where a party defendant died, pending a suit in a District Court, the suit should be sent to the court of Probates where the succession was opened.

Under those decisions the plaintiffs cannot maintain their action against the heirs on this judgment.

The judgment of the District Court is reversed, and judgment rendered against the plaintiffs as in case of non-suit, with costs in both courts.

HUGHEY et al. v. BARROW.

A party cannot controvert the title of one under whom he claims.

Where a husband purchased, during the existence of the matrimonial community, a settlement right on the public lands of the United States, and after its dissolution the government made to him individually a donation of land on account of the settlement of the party from whom he purchased, the land, under the spanish law then in force in this State, did not inure to the benefit of the community, but belonged exclusively to the individual to whom it was given. *Novis. Recop. b. tit. 4, l. 1.* The rule that things given by the sovereign formed no part of the community. but belonged exclusively to the party to whom they were given, applied to all cases except where the donation was in remuneration for military services rendered to the sovereign by a husband, who had served without pay and been

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supported by the community. *Fuero Real*, b. 3. tit. 3, l. 3. But the right of the wife as to any improvements made on the property is distinct from her right to the property itself: the augmentation of value by the common labor alone makes a part of the acquests and gains. The facts that the improvements were not made by the spouses, but were purchased by them, does not affect the principle.

Purchasers of land from a party in whose favor a judgment had been rendered based on the admission of his title by the defendant, are not bound to enquire into the truth of the admission. It is sufficient for them, in a contest with the heirs of the party by whom the admission was made, that the admission is on the records of the court, and that a judgment had been rendered on it.

Under the stat. of the Legislative Council of 10 April, 1805, regulating the practice of the late Supreme Court of the Territory, in all cases of liquidated accounts or demands, when no answer had been filed, the allegations in the petition were to be taken *pro confesso*, and the judgment rendered in consequence of the default of the defendant became final after three days, in consequence of his negligence, without any agency of the court.

Sec. 12 of art. 4 of the constitution of 1812, and sec. 70 of the constitution of 1845, which require the judges of all courts, as often as it may be possible to do so, in every definitive judgment, to refer to the particular law in virtue of which such judgment may have been rendered, and in all cases to adduce the reasons on which their judgment is founded, does not apply to an order making final a judgment by default.

A certificate of the auditor of public accounts that, "upon examining the tax-roll for the parish of T. for the year—, there appeared to be assessed thereon, in the name and as the property of A. H., five hundred acres of land," is inadmissible in evidence; though proof had been previously made that the original tax-roll, which was required by law to be deposited in the office of the parish judge, could not be found there. The certificate disclosing the existence of a copy of the tax-roll in the possession of the auditor, an extract from that copy, properly certified, is alone admissible.

The certificate of a mere matter of fact by a public officer is inadmissible. If he was bound to record the fact, a copy of the record, duly authenticated, is the proper evidence. As to matters which he was not bound to record, his certificate is merely the statement of a private person, and therefore inadmissible.

In sales for taxes the assessment stands in lieu of the judgment in ordinary judicial sales, and the party relying on a sale of that description is bound to show its existence and legality. Want of proof of a proper assessment and of a sufficient description of the land, where no actual possession has followed, are not defects that can be cured by the prescription of five years, under the stat. of 10 March, 1834, s. 4.

The purchase without warranty, by third person, of the right, title and interest of a party in a tract of land bought by him at a public sale for taxes, but of which he never had possession, cannot form the basis of prescription. The second purchaser was apprized of the nature of his title, and that it was defective.

A PPEAL from the District Court of West Feliciana, *Penn, J. Ratliff* and *B. A. Crawford*, for the appellants. *Huason, Petterson* and *Brewer*, for the defendant. The judgment of the court (*King, J. absent*,) was pronounced by

ROSE, J. This is a petitory action. The plaintiffs, as legitimate descendants and forced heirs of *Andrew* and *Mary Hughey*, deceased, claim six hundred and forty acres of land in possession of the defendant, and alleged to have formed part of the community which existed between the said *Andrew* and *Mary*. The defendant, and the warrantors made parties to the suit, do not seriously contest the heirship of the plaintiffs, but they deny the title alleged, and aver that, if it ever existed, it was not in the community, but in *Andrew Hughey* alone, who has since been legally divested of it in the following manner: 1st. By a judgment in favor of *John W. Hall* against him, for two hundred and forty arpents thereof. 2d. By a sheriff's sale, of three hundred and sixty acres of the land, made on the 2d day of June, 1824, under a twelve months' bond, given by him in satisfaction of a judgment obtained against him by *W. Wood*, on the 9th of October, 1821. 3d. By a tax-sale made on the 3d June, 1824, by the tax collector, of five hundred

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acres of land in the parish of Feliciana, fronting on the Mississippi, and belonging to *Hughey*. The defendant claims title under these partial alienations. He further avers that no proceedings were ever had in the successions of *Andrew* and *Mary Hughey*; that *Andrew* died in 1824 or 1825, and *Mary* in 1819, and that, since their death, their successions have been *hereditates jacentes*. He pleads the prescription of five years against informalities in judicial sales, under the act of 1834; the prescription of ten years against vacant successions; and the prescriptions of ten and twenty years under just titles, and open, peaceable, and uninterrupted possession. There was judgment in his favor in the first instance, and the plaintiffs appealed.

I. The first question which we will consider is, whether the plaintiffs have made out a title in the community or in *Andrew Hughey*. They have shown a probate sale of the succession of *Joshua Barker*, dated the 9th of March, 1816, and pending the marriage, showing the adjudication to *Hughey* of three hundred acres of the land in controversy, more or less, this being at the time a mere settlement right. The defendant objected to the introduction of this evidence on various grounds, which were overruled by the court, and we think properly overruled. The defendant, claiming under *Hughey*, cannot controvert his title. *Crane et al. v. Marshall*, 1 Mart. N. S. 578. *Verret's Heirs v. Candolle*, 4 Mart. N. S. 402. *Bedford v. Urquhart et al.* 8 La. 237.

This purchase was made during the existence of the marriage, and, after its dissolution, to wit, on the 8th May, 1822, the United States made to *Hughey* individually a donation of six hundred and forty acres of land, upon the original settlement of *Joshua Barker*. The plaintiffs contend that, the rights of *Barker* having been acquired by the community, the subsequent donation to *Hughey* must enure to its benefit. The donation was made at a time when the laws of Spain were still in force in Louisiana. Those laws provide that: 'Toda cosa que el marido y muger ganaren ó compraren, estando de consuno, háyanlo ambos por medio; y si fuere donadio de Rey ó de otro, y lo diere á ambos, háyanlo marido y muger; y si lo diere al uno, háyallo solo aquel á quien lo diere.' Nov. Recop. lib. 10, tit. 4, law 1. This law expressly ordains that things given by the sovereign shall not be common to the husband and wife, but shall belong exclusively to the individual to whom the king gives them.

This question first came before the Supreme Court in the case of *Gayoso v. Garcia*, 1 Mart. N. S. 334, and was decided against the community. This decision was maintained in the cases of *Rouquier v. Rouquier*, 5 Martin N. S. 98, and *Frique v. Hopkins et al.* 4 Ib. N. S. 212. In the last case, the court went into an elaborate examination of the laws of Spain on this subject, and we have no doubt of the correctness of the opinion to which they came; and the rule applies to all cases coming within its letter, except those where the king gave in remuneration of military services rendered to him by the husband, when he served without pay and was supported at the expense of the community. *Fuero Real* b. 3, tit. 3, law 3. *Febrero*, p. 1, c. 1, par. 22, no 239. In the same case the court held, on the authority of *Febrero*, that the right of the wife in ameliorations made on the property, is quite distinct from her right to the property, and that the augmentation of value, given by the common labor, alone made a part of the acquests and gains. The distinction attempted to be drawn, that the improvements in this case were not made by the husband and wife but were purchased by them, does not appear to us to affect the principle. The land was given without any price paid for it, and not in remuneration of any services rendered, and the consideration which may have induced the donation, or the fact that the

cost of the improvement right was paid by the community, cannot change the character and legal effect of the grant. We have no hesitation in saying that, the land did not enter into the community.

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II. The plaintiffs contend that the judgment in favor of *Hall* cannot prejudice them: 1st. Because the identity of the land is not shown. 2d. Because the title of *Hall* is alleged to be derived from *Lardois* and *Andrew Robertson*, and, as no title or confirmation is shown in these parties, the confession of *Hughey* that they had a title is not binding upon them. The land claimed by *Hall* is described in the petition as having six arpents front on the Mississippi river opposite the mouth of Red river, and then in possession of the defendant, by his tenant. The defendant compromised this suit, and, in execution of the compromise, made the judicial admission of the existence of the plaintiff's title upon which the judgment is based. We are of opinion that the evidence of the identity of the land is, *prima facie*, sufficient, and that the plaintiffs are estopped by the judicial admission of *Hughey* that the title was in *John W. Hall*. Purchasers under *Hall* were not bound to enquire into the truth of that admission. It was enough for them that it stood on the records of the court, and that a judgment had been rendered upon it. 1 Greenleaf, Evid. no. 27. 2 Annual, 446. 8 La. 422.

III. It is next urged that the sheriff's sale in the suit of *Wood v. Hughey* conveys none of the land in controversy, and that there is no legal evidence in the record establishing the boundaries, or the identity, of the land conveyed; that the judgment upon its face is unconstitutional, and can have no binding effect upon any one; and that the forms of law were not complied with, in the execution of said judgment. The land in the sheriff's deed is described as fronting on the Mississippi river, bounded east by lands of *McMasters* and west by lands of *Andrew Hughey*, and containing three hundred and sixty acres. The testimony of *Purvis* shows that *McMasters* lived half, or three-quarters, of a mile above the ferry-house opposite the mouth of Red river. This testimony, it is true, does not fix with precision the line of *McMasters*, but it shows that the land sold was the eastern portion of the tract, and the line may easily be ascertained by reference to the survey and location made by the United States.

The judgment in that case is in these words: "A judgment by default having been rendered in this case, it is, therefore, ordered that judgment be rendered for the plaintiff for \$596 40 $\frac{1}{4}$, with eight per cent interest from 31st January, 1821, till paid, and costs of suit." It is urged that the plaintiff did not prove his demand; that the judgment does not show that three judicial days elapsed after the default, and does not contain the reasons upon which it is founded, as required by the constitution of 1812.

Under the act of the Legislative Council passed, in 1805, regulating the practice of the late Superior Court, and still in force when *Wood* instituted his suit, in all cases of liquidated accounts or demands, when no answer was filed, the allegations in the petition were to be taken *pro confessis*, and the judgment, rendered in consequence of the default of the defendant, became final after three days, in consequence of his negligence and sufferance, without any agency of the court. It has been repeatedly held that reasons need not be assigned in a judgment, which becomes final by lapse of time and operation of law on a judgment by default. *Allard v. Ganucheau*, 4 Mart. 662. *Babin et al. v. Winchester*, 7 La. 460. The informalities alleged after the judgment need not be noticed in detail, as it is evident that they are all covered by the prescription of 10 years, under the act of 1834.

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The sale by the tax collector conveys a certain tract or parcel of land, assessed in the name of *Andrew Hughey*, lying in the parish of West Feliciana, containing five hundred acres, sold to pay the state and parish tax due on it by *Hughey* for the year 1822, amounting to \$12 75, and the costs and charges amounting to \$5. In support of this sale, the defendant offered in evidence a certificate of the auditor of public accounts, which is in these words: "This is to certify that, upon examining the tax roll for the parish of Feliciana for the year 1822, there appears to be assessed thereon in the name, and as the property of *Andrew Hughey*, five hundred acres of land, represented as being on the Mississippi river." The plaintiff objected to the introduction of this certificate in evidence, on the ground that it is not an original, nor the certified copy of an original, but a mere certificate of the auditor, who is not shown to be the keeper of the tax rolls; and further that it contains no description of the land pretended to be assessed.

We are of opinion that this exception should have been sustained. It is true the defendant proved that the original tax-roll, which the law requires to be deposited in the office of the parish judge, is not found there; but the certificate adduced discloses the existence of a copy of it in the possession of the auditor, and an extract from this copy properly certified, was the only admissible evidence. The law never allows the certificate of a mere matter of fact, given by a public officer, to be admitted as evidence. If he was bound to record the fact, the proper evidence is a copy of the record duly authenticated; and as to matters which he was not bound to record, his certificate is merely the statement of a private person, and, therefore, inadmissible. 1 Greenleaf, Evid. nos. 498, 509.

If this certificate had been properly in evidence, the description of five hundred acres of land on the Mississippi river, unsupported as it is by proof of possession, under the sheriff's sale, or by any other evidence going to show its identity with the land claimed, is too indefinite to pass the title. The want of proof of a proper assessment and of a sufficient description of the land, where no actual possession has followed, are not defects that can be cured by the prescription of five years, under the act of 1834. In sales for taxes the assessment stands in lieu of the judgment in ordinary judicial sales, and the party relying upon a sale of that description is bound to show its existence and legality. *Nancarrow v. Weathersby*, 6 Mart. N. S. 348. 7 La. 50. 10 La. 283.

It is unnecessary to determine whether this sale would be sufficient to support the plea of prescription, as no possession has been shown under it.

On the 16th June, 1824, seven days after the date of this sale, *Bowis*, the purchaser, sold to *Sterling*, without warranty, his right, title and interest in and to a certain tract of land exposed to public sale for taxes, and purchased by him. It does not appear that *Sterling* ever took actual possession, and, in 1834, he sold, also without warranty, to *Harmanson*, making an express reference to the act of sale from *Bowis* to him. This last sale, which embraces several titles, does not, on the face of it, purport to be a sale of land, but merely of claims to land, and the purchaser binds himself to incur all the expenses attending the prosecution of those claims. Under the deeds from *Bowis* to *Sterling*, and from *Sterling* to *Harmanson*, the purchaser was apprized of the nature of his title and that it was defective. Titles of this kind cannot form the basis of prescription. 4 Mart. N. S. 213, 222. 5 La. 246, 247. 3 Rob. 220. 4 Martin, 436. 10 Rob. 80.

This action was commenced in 1842, and the defendant cannot have prescribed under conveyances subsequent in date to those already noticed.

We are of opinion that, after deducting from the six hundred and forty acres granted to *Andrew Hughey* by the United States, the 240 arpents recovered by *John W. Hall*, and the three hundred and sixty acres sold at the suit of *William Wood v. Andrew Hughey*, the plaintiffs are entitled to recover the remainder; and that, in order to ascertain the boundaries between them and the defendant, and all matters relating to the rents and improvements and the liability of the warrantors, the case must be remanded.

It is, therefore, ordered that, the judgment in this case be reversed. It is further ordered that, the defendant be forever quieted in his possession and title, against all claims and pretensions of the plaintiffs, to the two hundred and forty arpents of land recovered by *John W. Hall* from *Andrew Hughey*, being six arpents front by forty deep, opposite the mouth of Red river, and including the house built by *Joshua Barker*; and also to the three hundred and sixty acres of land sold at the suit of *William Wood v. Andrew Hughey*, to be taken adjoining to the eastern line of the tract of six hundred and forty arpents confirmed by the United States to *Andrew Hughey*, under certificate no. 252, in pursuance of the act of Congress passed on the 8th May, 1822, entitled, an act supplementary to the several acts for adjusting claims to land and establishing land offices in the districts east of the island of New Orleans. It is further ordered that, the plaintiffs recover from the defendant the remainder of the aforesaid six hundred and forty acres, and that the case be remanded for the purpose of ascertaining the boundaries between them and the defendant, and all matters relating to rents and improvements, and to the liability of the warrantors. It is further ordered that the costs in both courts thus far incurred be paid by the defendant.

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SUCCESSION OF JOHNSON.

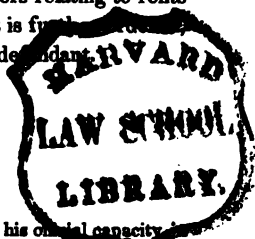
Minors will not be bound by a promissory note signed by their tutor in his official capacity, in the absence of proof of judicial authority to make the note, or that its consideration inured to their benefit.

APPEAL from the District Court of West Feliciana, *Lawson, J. Ratliff* and *Cowgill*, for the tutor, and *J. H. Collins*, for the under tutor, appellants. *Patterson* and *Brewer*, for the opponents, *Dorsey & Co.* The judgment of the court (*King J.* absent,) was pronounced by

SLIDELL, J. *J. Dorsey & Co.* sought to charge the estate of the minors *Johnson*, upon a promissory note signed by *Doherty*, their tutor, in his official capacity.

In the absence of proof of a judicial authorisation to make the note, or that the consideration of the note inured to the benefit of the minors, we think the claim should have been rejected. That those creditors formerly considered *Doherty* personally their debtor, is shown by the fact that they sued him personally upon the notes, and obtained a personal judgment against him.

It is, therefore, decreed that, the judgment upon the opposition of said *J. Dorsey & Co.* be reversed, and that upon said opposition there be judgment in favor of said minors; the costs of said opposition in both courts be to be paid by said opponents.



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A marriage settlement, executed in another State, where the property was situated and where the parties resided at the time, if valid by its laws, cannot be effected by the subsequent removal of the parties to this State.

By the laws of Mississippi, no covenant or agreement in consideration of marriage, nor any deed of marriage settlement or deed of trust, though the consideration be a valuable one and the *bond fides* of the parties unquestionable, is good against creditors, unless acknowledged by the parties bound thereby, or proved before a judge of the Supreme Court, or a justice of the county court, or justice of the peace, or notary public of the county in which the lands, tenements, and hereditaments, or some part thereof, are situated, and unless a certificate of such acknowledgment or proof, written upon said instrument, and signed by the officer before whom it was made, be lodged with the clerk of the county court of the proper county, to be there recorded in the same manner as other deeds of real or personal estate are required by law to be acknowledged or proved. A marriage settlement, not duly acknowledged or proved, and recorded, is not void merely as to creditors having liens on the property to be affected, but is void as to all creditors whosoever.

On a question arising under the laws of another State, in which the english common law, so far as adapted to our constitutions and consistent with our form of government, and not repealed or modified by statute, is in force, and where the principles of the english equity jurisprudence also prevail, and where the courts are authorized to look to english authorities in equity for rules of decision on questions turning on the principles of equity, the courts of this State will be bound to notice any thing applicable in principle, which it finds laid down in approved works.

In those States in which the common law prevails, a general lien on land resulting from a judgment, constitutes, *per se*, no property or right in the land itself. It confers only a right to levy on the land, to the exclusion of other adverse interests subsequent in date to the judgment, and can only be made effectual by a levy.

A deed, executed in a State where the english common law prevails, conveying property to a trustee, for the benefit of creditors of the grantor, though fraudulent and void as to creditors, is sufficient to divest the legal title of the grantor, and conclusive against him. And where the property so conveyed in trust for the creditors, is subsequently conveyed by the grantor to a trustee as a marriage settlement, it can only confer on the intended wife, or on her trustee for her benefit, the right to have a conveyance made to her of the property when the prior deed shall have been satisfied or otherwise discharged. It creates in her favor a lien in equity only, of no validity against a creditor until actual notice, or the filing of a bill asserting such lien, which is constructive notice; and where a judgment creditor, who, by reason of the conveyances in trust for the creditors, has but a lien in equity upon the property conveyed, instead of a legal lien, files his bill in equity before any actual or constructive notice of the deed of marriage settlement, his right to subject the property to his debt will take precedence of that of the wife. As the judgment creditor would prevail in Mississippi over the wife, by reason of his earlier assertion of his equitable claim by a bill in equity, the husband cannot, by subsequently removing slaves, who formed a portion of the property to this State, create a right of priority in her favor.

A PPEAL from the District Court of Carroll, *Selby, J. Short and Parham*, for the plaintiffs. *Thomas and Snyder*, for the defendants. The judgment of the court, (*King, J. absent*,) was pronounced by

EUSTIS, C. J. This suit is brought on a judgment obtained by the plaintiffs in the State of Mississippi, against *Samuel Templeton* and others. The object of it is to obtain a judgment in this State against *Samuel Templeton*, one of the defendants, and to annul a conveyance of certain slaves made by said *Templeton* to another defendant, *James Wyley*, in trust for *Mrs. Templeton*, in consideration of marriage, and to subject the slaves, twenty-one in number, to the pay-

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ment of the plaintiffs' debt. There was a verdict of a jury in favor of the plaintiffs, against *Templeton*, for the amount of his debt, but in favor of the other defendants *Wyley* and *Mrs. Templeton*, against the plaintiffs; and judgment having been rendered accordingly, the plaintiffs have appealed.* The judgment having sustained the conveyance under which the slaves were held in trust for the benefit of *Mrs. Templeton*, the principal argument of counsel has been directed to the question of its validity.

On the 9th of October, 1843, in view of the marriage afterwards contracted, and in consideration thereof, *Templeton*, the defendant, made a settlement of these slaves, with other property, through the instrumentality of a trustee, upon his future wife, selecting *Wyley*, his father-in-law, for the trustee. The deed was executed in Madison, in the State of Mississippi, the residence of *Wyley*; that of *Templeton* being in Warren county of that State. *Templeton* and his wife, early in December, 1846, removed to the parish of Carroll in this State, with the slaves, and the instrument above described was there recorded about that time.

The judgment on which this suit is brought, was rendered in May, 1840, in the Circuit Court of Warren county, Mississippi. If the marriage settlement was valid against the plaintiffs under the laws of Mississippi, the parties residing there, and the property upon which it was to operate being also there, it may be assumed that the rights of ownership under it are not affected by the removal of both to this State. The validity and effect of the settlement under those laws is, therefore, to be examined.

It is contended by the counsel for the plaintiffs that, the marriage settlement never had any legal existence under the laws of Mississippi, as to those who were creditors of *Templeton* at the time it was executed; that it was void as to all such creditors, whether they had judgments or not, it not having been acknowledged, proved, or recorded in the manner required by the statutes of that State in order to give it effect.

We understand the statute particularly referred to as providing that no covenant or agreement, in consideration of marriage, shall be good against *any creditor*, unless it be acknowledged by the party bound thereby, or proved to be his act, and lodged with the clerk of the County Court of the proper county, to be there recorded in the same manner as other deeds of real or personal estate are by law required to be acknowledged, proved, and recorded. The next section provides that, all deeds of settlement of marriage, and all deeds of trust, shall be void as to all creditors, unless they shall be acknowledged or proved and lodged with the clerk of the County Court of the proper county, to be recorded according to the directions of the act. The directions of the act appear to be that the writing be acknowledged or proved before a judge of the Supreme Court of the State, or a justice of the County Court, justice of the peace, or notary public of that county, in which the lands, tenements, or hereditaments, or some part thereof, are situated, and that a certificate of such acknowledgment or proof, written upon said instrument and signed by the officer before whom it was made, be lodged with the clerk of the County Court, to be there recorded. Statutes of Mississippi, by Howard & Hutchinson, p. 343.

The only evidence of a compliance with the provisions of this statute by the parties to the marriage settlement, is a certificate of the clerk of the Probate Court of the county of Madison, State of Mississippi, dated on the 25th of Decem-

* The defendant *Samuel Templeton*, also appealed.

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cember, 1843, to the effect that, the two subscribing witnesses appeared before him, and proved the execution and delivery of the instrument on the day and for the purposes therein mentioned.

In the act of settlement *Templeton* describes himself as of the county of Warren, and conveys to his future wife, twenty-one slaves, together with the plantation upon which he then resided in Warren county, with all the stock, farming utensils, household and kitchen furniture, and other moveables. It is therefore apparent that, the requisites of the statute as to acknowledgment, proof or recording, have not been complied with. Nor does it appear, except as stated, that the instrument ever had effect in the State of Mississippi. It stands then as a private writing, without any act connected with it which would give it any effect as an executed contract.

But it is contended by the counsel for the defendants, that *Mrs. Templeton* must be considered in the same light as a purchaser for a valuable consideration, the law attaching that import to marriage settlements from motives of the soundest policy. *Templeton*, as we have seen, lived in the county of Warren, and his property was there situated. *Mrs. Templeton*, before her marriage, resided in the county of Madison, and it is said she and her father, the trustee, were entirely ignorant of the state of the affairs of *Templeton*. But the answer to this argument is found in the statute itself. Whatever may be the verity of the consideration and the *bond fides* of the party to the marriage settlement, to have effect against creditors it must be acknowledged, or proved, and recorded as the statute has provided.

It is also urged that marriage settlements not duly acknowledged, proved and recorded, are void *merely* as to creditors having liens, but, if the lien be lost, such settlements are not void in relation to creditors having no lien on the property to be affected by the settlement.

The term made use of in the statute is general—all creditors without any limitation. If the operation of this statute is only in favor of creditors by judgment, or judgment creditors having liens, it must depend exclusively upon the jurisprudence of that State.

In the case of *Armfield v. Armfield*, 1 Freeman's Chancery Reports, 316, the chancellor of Mississippi stated, in giving his opinion, that courts of equity go very far to sustain marriage settlements where they are just and free from the imputation of fraud, and that marriage is held to be a *bond fide* consideration, and the wife stands in the light of a *bond fide* purchaser, and is entitled to the same protection. He refers to the treatise of Atherby on Marriage Settlements, p. 130, as containing the doctrine that the claim of creditors is never an objection to the execution of marriage articles, unless they were creditors by judgment or other matter of record before the articles were entered into.

That the plaintiffs had a lien on the property in dispute by virtue of their judgment and its enrollment, is conceded in argument; but it is urged that the lien having expired by the effect of the act of the legislature referred to, although the marriage settlement would have been void at the time it was executed as to the plaintiffs, yet by reason of the extinguishment of the lien they are not in a situation to be able to contest the validity of the marriage settlement.

We understand the common law of England, so far as it is adapted to our institutions and is consistent with our form of government and not repealed or modified by statute, to be in force in Mississippi, and that the principles of equity jurisprudence which prevail in England are those which prevail in that State, and

that courts there are authorized to look to english authorities in equity, for rules of decision on questions turning on the principles of equity.

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As no adjudged case has been adduced pertinent to the subject and as the true rule in this case which a court of equity in Mississippi would be guided by, rests entirely on doctrine, we are bound to notice what we have found laid down in approved works, and which is applicable in principle to the case under consideration.

It is stated in the treatise of Mr. Sugden on Vendors, a work which has received commendation for its exactness and the learning ability of its author, that although a judgment was not docketed and therefore void against a purchaser, yet, if the purchaser had notice of it and did not pay the value of the estate, it was presumed that he agreed to pay off the judgment, and equity compelled him to pay it; and that the general rule of equity would warrant the assertion that the case would have been the same although no agreement had been made. It had been decided by the master of the rolls that, notice of judgment not docketed was not material, but the case has been overruled, and Lord Eldon decided in favor of the purchaser being bound by notice of the judgment creditor, though the judgment was not docketed, and carried with it no lien. C. 12, § 20. This was the doctrine in England, on the subject previous to the act of 1 and 2 Vict. c. 110. Vide Coote on Mortgages, 71.

By the act of the legislature of Mississippi, before referred to, the liens created by judgments obtained previous to its passage were limited to two years. The plaintiff's judgment was duly enrolled before the date of the marriage settlement, and under this law would have expired pending the litigation between the plaintiffs and *Joseph Templeton et al.*, which had for its object to subject the property of *Samuel Templeton*, covered by a deed of trust, to the payment of their judgment, which we will afterwards notice.

It is not understood that a general lien by judgment on lands, constitutes, in law, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment, and can only be made effectual by that means. *Conrad v. Atlantic Insurance Company*, 1 Peters' Rep. p. 443.

The marriage settlement never having been recorded in Mississippi, and there being no pretence for any notice of it to the plaintiffs, it is very difficult to perceive on what ground it could have been held valid against a levy on the property by an execution of the plaintiffs. Here this levy was prevented by the conveyance of the legal estate in the property under the deed of trust to *Joseph Templeton*, which the plaintiffs have been attempting to set aside. This deed having been recorded in the proper county, and the judgment having been enrolled there, it seems to us obvious, that it fixes the notice of both upon the trustee as well as the party in interest, and disclosed fully the rights of plaintiffs under their judgment, and the desperate condition of *Templeton's* affairs. The transfer of his homestead, furniture, and slaves, could imply nothing else, and we do not understand how, by going out of his county and contracting with a person there, the latter could be held ignorant of, or relieved against, those incumbrances. Under our laws a marriage settlement of this character, adversely to creditors, would have no effect, and we are not able to understand on what ground it can be sustained on the principles of equity recognized in England and in Mississippi. The very case we before noted, that of *Armfield*, appears to be conclusive against the defendants; the settlement under those circumstances is, in no sense, just, nor is it free from the imputation of fraud.

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It is necessary to ascertain what estate or property the trustee, *Wyley*, acquired in the property conveyed to him by the marriage settlement. The argument of the defendants' counsel has given the answer to this inquiry. He states that, at the time of the recovery and enrollment of the plaintiffs' judgment in Mississippi, the title was in *Joseph Templeton* under the deed of trust. This deed was offered in evidence, and the plaintiffs' bill in chancery and the proceedings had, show that the litigation for the purpose of annulling it, is still pending in Mississippi. A statement of these matters becomes necessary in order to explain the title in *Joseph Templeton*, as asserted by the counsel.

The appellants, *Young, Smith & Co.* first instituted suit in the Circuit Court of Warren county, Mississippi, on the 3d of October, 1838, against *Samuel Templeton et al.*, in which the judgment was obtained which constitutes the foundation of the present action. The writ in that suit, was executed on *Templeton* on the 15th of October, 1838. At the November term, *Templeton* put in a demurrer to the declaration, and the case was continued until the next term, which was to come on the 20th of May, 1839. On the 9th of May, 1839, he made a transfer of all his property, consisting of about nine hundred and sixty acres of land in Warren county, Mississippi, with about fifty negroes, together with all his stock, growing crops, and every thing, down to the household furniture, to his brother, *Joseph Templeton*. The deed was put on record in Warren county, on the 15th July, 1839. On the 1st of May, 1840, the appellants obtained their judgment in the Circuit Court of Warren county, against *Samuel Templeton, Isaac N. Glidwell, Thomas M. Green* and *John Gowan*, for the sum of \$11,472 66, and costs of suit. Execution having issued on this judgment and been returned "*nulla bona*," the sheriff having made no levy on the property of *Samuel Templeton*, it having been thus conveyed to *Joseph Templeton*, no further proceedings appear to have been taken by the appellants until the 20th of March, 1844. They then filed their bill for the purpose of annulling the deed of trust from *Samuel* to *Joseph Templeton*, made on the 9th of May, 1839, on the ground that it was made to hinder, delay, and defraud the creditors. All the parties who were supposed to claim any rights under the deed of trust were made parties to the suit. All were called on to set forth the amount of the debts which they claimed as secured by the deed of trust. The bill directly charged that no such debts existed, or that, if they ever did exist, they had been paid off by *Samuel Templeton*, and that the deed of trust was held up as a shield in fraud of the rights of the complainants. Neither the creditors, nor *Joseph Templeton* ever answered the bill. Judgment *pro confesso* was entered against them and all the other defendants. On the 12th of June, 1845, on motion of *Samel Templeton*, the *pro confesso* judgment was set aside as to him, and he had leave to file his answer. The only portion of this answer we deem it necessary to notice is, that *Templeton* admits that from the execution of the deed of trust in 1839, he had been in possession of the property conveyed in the deed, and in the receipt of the proceeds; and that no steps were ever taken by the trustee, or the creditors mentioned in the trust deed, to apply the property conveyed to the objects of the trust. After *Samuel Templeton* had filed his answer other parties were added to the suit who claimed rights superior to those asserted by the complainants, under certain judgments they held against *Samuel Templeton*, and, pending these proceedings, in November, 1846, as we have seen, *Templeton* removes to Louisiana with his household, slaves, and moveables.

The marriage contract was put on record in the parish of Carroll, on the 5th of December, 1846. This instrument purports to have been executed in the

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county of Madison, in the State of Mississippi, on the 9th of October, 1843. By it *Samuel Templeton*, in consideration of the marriage intended to be shortly had between him and *Martha E. Wyley*, and in case the said marriage should take place, conveys to *James Wyley*, in trust for the benefit of his intended wife, a large amount of property. The property conveyed in the marriage contract consists of twenty-one of the same negroes that were conveyed in the deed of trust to *Joseph Templeton*; also all the household and kitchen furniture, stock of hogs, cattle, sheep, horses and other beasts, wagons and farming utensils, together with a "fine four-wheeled carriage and harness and a piano forte"; and also a tract of land, the plantation on which *Samuel Templeton* then lived, section twenty-six. The land is the same that was conveyed in the deed of trust to *Joseph Templeton*. This marriage settlement never was recorded, either in Madison county, where it was executed, or in Warren county, where the property is situated.

To return then to the inquiry as to the title of the trustee, *Wyley*, or that of the wife of the debtor, *Samuel Templeton*, in the slaves, which are the subject of this suit: *Templeton*, the defendant, having, by his deed of the 9th May, 1839, conveyed his whole legal estate in the slaves, with the other property, to his brother for the benefit of his creditors, it is clear that he had no legal title remaining in him which he could convey in the marriage settlement. The deed to his brother, whether fraudulent as to creditors or not, was valid between the parties, and was of ample force at common law to vest the legal title to the slaves in *Joseph Templeton*, and the deed from *Samuel Templeton* to *Wyley*, in October, 1843, conveyed no legal title in this property. It gave to the intended wife, or her trustee, for her benefit, the right to have a conveyance made to her of the property when the prior deed should be satisfied by the payment of the debts, or otherwise discharged.

It created in her favor a lien in equity only, which is of no validity against a creditor until, either actual notice, or the filing of a bill asserting such lien, which is constructive notice. Had the marriage settlement been recorded under the laws of Mississippi at its date, (9th October, 1843,) such recording would have fixed the date of this equitable lien on all others claiming also liens in equity upon the property. But before it was recorded, and while concealed strangely by the trustee, a judgment creditor, who, by reason of the deed to *Joseph Templeton*, has but a lien in equity upon the property instead of a legal lien, files his bill in equity on the 20th March, 1844, and asserts his lien in equity. In such a case we understand the rule to be, *qui prior in tempore, potior in jure est*. The right of the judgment creditor to subject this property to his lien in equity must date from the filing of his bill, and that of the wife, from the first publication of her equitable claim in the parish of Carroll, in 1846.

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We consider the possession to have been unchanged since the first deed to *Joseph Templeton*, and to have remained unchanged in *Samuel Templeton*.

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TEMPLETON.

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AND CARROLL-
TON RAILROAD
COMPANY.

defendants of the omnibus having been denied, by the general denial filed by them, the proof tendered was inconsistent with that denial. The objection made by the counsel for the plaintiff to the admission of the instrument offered was that, there was no special plea to the effect that the omnibus in question had been leased and was not under the control of the defendants.

The responsibility of the defendants to the plaintiff, as we apprehend, depends not upon the ownership of the omnibus, but upon the fact that the damage was done by their servant, for whose acts they are sought in this action to be made liable. The object of the defendants was to show, by legal evidence, that the omnibus was under the exclusive control of the lessees of the railroad establishment, who alone employed the drivers, and that the driver in this particular case was not their servant but exclusively that of the lessees. Under the general issue we think the evidence admissible.

We do not deem it necessary to decide on the other bill of exceptions taken by the counsel for the defendants to a portion of the charge of the judge, as the case goes back, and the necessity to determine on the points raised may not again occur.

The judgment of the District Court is reversed and the cause remanded for a new trial, with directions to the district judge to admit in evidence the authentic act offered by the defendants of date the 24th January, 1837, mentioned in the bill of exceptions no. 1, and that the plaintiff pay the costs of this appeal.

McGILL v. MCGILL.

Receipts of receivers of public moneys of the United States for the price of public lands, are sufficient evidence of title from the government to form the basis of a petitory action, in which the property itself may be recovered. *Per Curiam*: Lands held under such instruments enter into the domain of private property, and as such are subject to contracts, and, when there is no reservation by Congress, are liable to taxation.

A patent from the United States is conclusive evidence of the divestiture of the fee in the land, which remained in the United States notwithstanding the sale made by its officers and the receipt of the price; but it does not affect any right to the land which may have existed under contracts between the patentee and third persons. The patent, to whomsoever issued, inures to the benefit of him to whom the patentee is bound to convey the legal title.

A patent for public lands fraudulently obtained, or illegally issued, is void.

A purchaser at a probate sale, of lands held by the deceased under an act of sale from an assignee of the receipts given by the receiver of public moneys for the original price of the land made *sous seing privé* and never registered, who has been for several years in actual notorious possession under a recorded title, cannot be affected by one claiming under a subsequent purchase of the land from the party by whom the price was paid to the government, and to whom the patent had been issued. The last purchaser, being the assignee of the party by whom the receipts had been previously assigned, cannot take advantage of the defect of registry and is bound by the act *sous seing privé*. C. C. 2417, 3523, § 5. *Per Curiam*: A purchaser will be charged with notice who buys, in the face of a notorious adverse possession, under a recorded title, for several years, from one who holds merely the legal title—the patent, which inures to the benefit of the equitable owner, without possession or apparent ownership.

Although acts under private signature do not of themselves prove the date of their execution against third persons, their date may be established by other evidence besides the actual proof of the time of their execution. Any circumstances which renders the ante-dating of the act impossible will give effect to its date.

4	262
53	2009
4	362
111	428
4	262
125	164

A PPEAL from the District Court of Tensas, *Selby, J. Shaw, Prentiss and Finney*, for the plaintiff. *Stacy and Sparrow*, for the warrantor appellant. The judgment of the court (*Slidell, J.* not sitting,) was pronounced by

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EUSTIS, C. J. This is a petitory action for the recovery of a certain tract of land situated in the parish of Tensas, in the possession of the defendant *Penelope McGill*. The defence was made by *Edward Sparrow*, the curator of the succession of *Ducker*, deceased, from whom *Penelope McGill* purchased, and who was cited in warranty to defend the suit. The plaintiff had judgment in the District Court, and the curator has appealed.

Washington purchased the land in 1833 from the government, and took the usual duplicate receipts for the price paid from the United States receiver. Patents for the land were not issued until the 15th June, 1837; they were in his name, and appear to have been received by him. On the 26th of December, 1842, a sale of this land was made from *Washington* to the plaintiff by public act passed in the parish of Concordia, for the consideration of \$2,200, which the vendor acknowledges to have received.

It is contended that a legal title to the land has thus been made out in the plaintiff, which must prevail unless a better title is established to be in the defendant, or unless it be shown that the plaintiff's title is fraudulent. The burthen of establishing both these propositions is assumed by the warrantor, who defends the suit. *Sparrow*, the curator, alleges a valid and superior title to the land as against the plaintiff to have been vested in the succession of *Ducker*, and that the purchase of the title of *Washington* was the result of a fraudulent combination between the plaintiff, who is the son of the defendant *Penelope McGill*, the mother, the other defendant who is her brother-in-law, and *Washington*, the object of which was to effect an eviction of said *Penelope McGill* from the land, and thereby relieve her from the payment of the price of the land for which she was then sued.

We will examine the title under which the defendant holds the land under her purchase from the succession of *Ducker*, in 1838, conceding the proposition of the plaintiff's counsel as to the effect to be given to his title, subject to the contingency stated.

Penelope McGill, the person in possession, purchased the land on the 22d June, 1838, at the judicial sale of the effects of the succession of *John Ducker*. It was adjudicated at the price of \$51 50 per acre, amounting to \$23,175, payable in one, two, three and four years. The *procès-verbal* of the sale describes the land as the same tract purchased by said *Ducker* of *Jeremiah B. Warren*, containing four hundred and fifty acres more or less, &c., and refers to the inventory for a particular description. In the inventory the land in controversy, which consists of several parcels, is described under the general denomination of lots of land entered by *Dr. H. F. Washington* containing four hundred and fifty acres. In the mortgage given by the purchaser to secure the notes given in accordance with the conditions of the adjudication, the land is again described in the same manner as in the *procès-verbal*. The inventory and *procès-verbal* were duly recorded. There is no question as to the identity of the land, nor of *Ducker's*, nor the defendant's possession.

A writing under private signature, having the scrawl of a seal, bearing date, Rodney, August 1st, 1834, signed by *J. B. Warren*, and bearing the signature of two witnesses, is produced in evidence on the part of the warrantors. It purports that *J. B. Warren* hath, on that day, bargained and sold to *John Ducker* the land in controversy on the banks of the Mississippi, describing it by one of

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In this view of the case it is not necessary to consider whether the 13th section of the stat. of 24 February, 1844, of the State of Mississippi, by which the lien of preceding judgments was to cease in two years, is or is not in conflict with the constitution of the United States. If the law is held to operate upon any other than liens at law, we think it is sufficient to say that, the lien in this case, which we have called a lien in equity, was put into execution within the two years required, to wit, in March following its passage. The proceeding was against the property in the possession of *Samuel Templeton*, and, until we find it decided by the courts of Mississippi that, the lien is lost both in law and equity, by the effect of the statute, while it is in litigation, under a state of facts as presented in this case, we must give the parties before us the benefit of our own convictions.

It is contended that the deed of trust from *Samuel Templeton* to *Joseph Templeton*, presents an obstacle to the application of the slaves to the satisfaction of the judgment of the plaintiffs. We think not. A court of equity in Mississippi, would not hesitate in decreeing the nullity of that deed. The retention of an interest in the grantor, the possession which he retains, with the revenues, and the fact that no time is to be discovered from its tenor, within which it is to be executed, are objections fatal to its validity. We conclude, therefore, that the plaintiffs are entitled to the relief they ask.

It is, therefore, decreed that, the judgment in favor of the plaintiffs against *Samuel Templeton* stand affirmed, that the judgment in favor of *Martha E. Templeton* and the said *James W. Wyley* be reversed, and that the conveyance from the said *Samuel Templeton* to the said *James W. Wyley*, for the use of *Martha E. Wyley*, of date of the 9th of October, 1843, so far as the same relates to the slaves mentioned therein and described in the plaintiffs' petition, be declared to be null, void, and of no effect, and that said slaves be subjected to the payment of the said plaintiff's debt, with interest and costs; and that the appellees pay the costs of this appeal.

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46	402
46	636

RIGHTOR et al. v. DE LIZARDI et al.

In an action for a partition of land all the parties in interest must be joined; and it devolves on the plaintiff, on an issue made by one of the defendants, to show that the proper parties are before the court. C. C. 1252. C. P. 1024.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preston*, for the plaintiffs. *T. A. Clarke*, for the appellant. The judgment of the court (*Slidell, J.* not sitting on account of relationship to one of the parties,) was pronounced by

KING, J. The plaintiffs allege themselves to be the owners of a large tract of land, in partnership with the defendants, and have instituted this suit for a partition. The defendant *Slidell* alone opposed the action. A judgment was rendered in the court below in accordance with the prayer of the plaintiffs, and the defendant, *Slidell*, has appealed.

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An insuperable objection presents itself to our affirming the judgment appealed from. *Rightor* and wife claimed three-ninths of the land held in partnership, but have shown no title in themselves. The evidence in the record would show them to be without title, and that the portion claimed by them belongs to other parties. It is true that, two of the plaintiffs have shown themselves to be joint owners, and they have an undoubted right to claim a partition. C. C. art. 1215, 1227. But it is indispensable to the validity of the proceedings that all the parties in interest should be joined in the action; and it devolved upon the plaintiffs, upon the issue made by one of the defendants, to show that the proper parties were before the court. C. C. 1252. C. P. 1024. *Farrar v. Newport et al.* 17 La. 348.

It is, therefore, ordered that the judgment in this case be reversed, and that it be remanded for further proceedings according to law; the plaintiff *Rightor*, and wife paying the costs of this appeal.

HART v. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY

In an action for damages for the destruction of plaintiff's carriage, caused by the neglect and imprudence of the driver of an omnibus alleged to belong to defendants, the latter may, under the general issue, offer proof that the omnibus had been leased by them to a third person at the time of the accident. The liability of defendants depending, not upon the ownership of the omnibus, but on the fact that the damage was done by their servant, it is no objection to such evidence that it is inconsistent with the denial of ownership of the omnibus in their plea of general denial.

APPEAL from the Fifth District of New Orleans, *Buchanan, J. Roselius*, for the plaintiff. *Micou*, for the appellants. The judgment of the court (*Slidell, J.* not sitting, having been of counsel,) was pronounced by

Eustris, C. J. This action is brought to recover the sum of \$850, damages for the destruction of the plaintiff's carriage, alleged to have been caused by the negligence, imprudence, or want of skill of the driver of an omnibus belonging to the defendants, in running foul of the carriage as it was standing in Chartres street, in the city of New Orleans. The general issue was pleaded. The plaintiff obtained a verdict in March, 1839, which was set aside on an appeal, in December, 1841. 1 Rob. 179. The present appeal is taken by the defendants from a judgment rendered on another verdict in favor of the plaintiff, on a new trial had in March, 1848. The case has been pending since July, 1838.

The accident is alleged to have taken place on or about the 20th July, 1837. On the last trial of the cause the defendants offered in evidence an instrument by public act, bearing date the 24th of January, 1837, by which the railroad establishment, with its moveables and dependencies, including these omnibuses, were leased to two individuals for a term of years. It was not admitted in evidence by the district judge, and thus deciding the defendants took a bill of exception to his decision. The judge was of opinion that, the ownership of the

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TEMPLETON.

appearance of the marriage settlement, which is now set up to defeat it. From the best consideration which we have been able to give to this difficult question, we believe that, in a court of equity in Mississippi, the judgment creditor would prevail, for the reason that he was the earliest to assert his equitable claim by the filing of his bill over the wife's equitable title which her trustee had neglected to assert and publish. If she could not have secured her priority in Mississippi, we cannot permit the husband, by removing the subject of the litigation to this State, to create a right of priority in her favor.

In this view of the case it is not necessary to consider whether the 13th section of the stat. of 24 February, 1844, of the State of Mississippi, by which the lien of preceding judgments was to cease in two years, is or is not in conflict with the constitution of the United States. If the law is held to operate upon any other than liens at law, we think it is sufficient to say that, the lien in this case, which we have called a lien in equity, was put into execution within the two years required, to wit, in March following its passage. The proceeding was against the property in the possession of *Samuel Templeton*, and, until we find it decided by the courts of Mississippi that, the lien is lost both in law and equity, by the effect of the statute, while it is in litigation, under a state of facts as presented in this case, we must give the parties before us the benefit of our own convictions.

It is contended that the deed of trust from *Samuel Templeton* to *Joseph Templeton*, presents an obstacle to the application of the slaves to the satisfaction of the judgment of the plaintiffs. We think not. A court of equity in Mississippi, would not hesitate in decreeing the nullity of that deed. The retention of an interest in the grantor, the possession which he retains, with the revenues, and the fact that no time is to be discovered from its tenor, within which it is to be executed, are objections fatal to its validity. We conclude, therefore, that the plaintiffs are entitled to the relief they ask.

It is, therefore, decreed that, the judgment in favor of the plaintiffs against *Samuel Templeton* stand affirmed, that the judgment in favor of *Martha E. Templeton* and the said *James W. Wyley* be reversed, and that the conveyance from the said *Samuel Templeton* to the said *James W. Wyley*, for the use of *Martha E. Wyley*, of date of the 9th of October, 1843, so far as the same relates to the slaves mentioned therein and described in the plaintiffs' petition, be declared to be null, void, and of no effect, and that said slaves be subjected to the payment of the said plaintiff's debt, with interest and costs; and that the appellees pay the costs of this appeal.

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RIGHTOR et al. v. DE LIZARDI et al.

In an action for a partition of land all the parties in interest must be joined; and it devolves on the plaintiff, on an issue made by one of the defendants, to show that the proper parties are before the court. C. C. 1252. C. P. 1024.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Preston*, for the plaintiffs. *T. A. Clarke*, for the appellant. The judgment of the court (*Slidell, J.* not sitting on account of relationship to one of the parties,) was pronounced by

KING, J. The plaintiffs allege themselves to be the owners of a large tract of land, in partnership with the defendants, and have instituted this suit for a partition. The defendant *Slidell* alone opposed the action. A judgment was rendered in the court below in accordance with the prayer of the plaintiffs, and the defendant, *Slidell*, has appealed.

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An insuperable objection presents itself to our affirming the judgment appealed from. *Rightor* and wife claimed three-ninths of the land held in partnership, but have shown no title in themselves. The evidence in the record would show them to be without title, and that the portion claimed by them belongs to other parties. It is true that, two of the plaintiffs have shown themselves to be joint owners, and they have an undoubted right to claim a partition. C. C. art. 1215, 1227. But it is indispensable to the validity of the proceedings that all the parties in interest should be joined in the action; and it devolved upon the plaintiffs, upon the issue made by one of the defendants, to show that the proper parties were before the court. C. C. 1252. C. P. 1024. *Farrar v. Newport et al.* 17 La. 348.

It is, therefore, ordered that the judgment in this case be reversed, and that it be remanded for further proceedings according to law; the plaintiff *Rightor*, and wife paying the costs of this appeal.

HART v. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY

In an action for damages for the destruction of plaintiff's carriage, caused by the neglect and imprudence of the driver of an omnibus alleged to belong to defendants, the latter may, under the general issue, offer proof that the omnibus had been leased by them to a third person at the time of the accident. The liability of defendants depending, not upon the ownership of the omnibus, but on the fact that the damage was done by their servant, it is no objection to such evidence that it is inconsistent with the denial of ownership of the omnibus in their plea of general denial.

APPEAL from the Fifth District of New Orleans, *Buchanan, J. Roselius*, for the plaintiff. *Micou*, for the appellants. The judgment of the court (*Slidell, J.* not sitting, having been of counsel,) was pronounced by

EUSTIS, C. J. This action is brought to recover the sum of \$850, damages for the destruction of the plaintiff's carriage, alleged to have been caused by the negligence, imprudence, or want of skill of the driver of an omnibus belonging to the defendants, in running foul of the carriage as it was standing in Chartres street, in the city of New Orleans. The general issue was pleaded. The plaintiff obtained a verdict in March, 1839, which was set aside on an appeal, in December, 1841. 1 Rob. 179. The present appeal is taken by the defendants from a judgment rendered on another verdict in favor of the plaintiff, on a new trial had in March, 1848. The case has been pending since July, 1838.

The accident is alleged to have taken place on or about the 20th July, 1837. On the last trial of the cause the defendants offered in evidence an instrument by public act, bearing date the 24th of January, 1837, by which the railroad establishment, with its moveables and dependencies, including these omnibuses, were leased to two individuals for a term of years. It was not admitted in evidence by the district judge, and thus deciding the defendants took a bill of exception to his decision. The judge was of opinion that, the ownership of the

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and the adverse possession was what the law defines as natural possession, not merely civil possession, and there could be no question as to its being actual notice and presumptive evidence of ownership.

The discussions which have taken place among civilians as to the meaning of the words *tiers* and *ayants-cause* under the Napoléon Code, and the difficulties which our courts have had in establishing any rule of universal application on their sense as used in our Codes, are familiar to the profession. Art. 3522, §§ 5, 32. They have admonished us of the caution necessary to be exercised in undertaking to lay down any general principles on this perplexed subject. In the cases we have decided, and in that under consideration, we concede that there are difficulties in the rule on which they are determined: but the antagonist doctrine appears to us to be not only impossible under our system in its operation, but immoral and subversive of all principles of common justice. In holding that actual notorious possession under a recorded title for several years is notice to all the world of ownership, we are not aware that any principle is asserted which is not in harmony with the law itself as well as with public policy.

The entry of land by purchasers at the land office is not only a public act, but in all new settlements the entry is not only a matter of notoriety but the land frequently takes its name from the person making the entry. The facility given to the transfer of the rights of the purchaser by the assignment of the land receipts has rendered very common the use of acts under private signature in the sale of lands purchased from the United States, as the records of our courts abundantly testify. In charging a purchaser with notice, who buys in the face of a notorious adverse possession under a recorded title for several years, from a person who holds merely the legal title—the patent which inures to the benefit of the equitable owner—without possession or apparent ownership, the facilities for speculation in titles may be abridged, but the interests of *bond fide* purchasers and of property itself will be subserved and protected. The apparent adverse ownership is, according to every fair presumption, under the entry, and of itself is sufficient to put any prudent man, who treats with a person out of possession, upon his guard against the title he is about purchasing.

To enable a man who has sold a thing once to turn round, and, with the price in his pocket, to sell the same thing to another who knows of the first sale, is to encourage iniquity and give effect to fraud. When the second purchaser is *without notice*, and the consideration of his purchase is what the law holds to be valuable, as he is not a participator in the fraud, he is maintained in his legal rights, and equity will give no assistance against him, for he has done nothing against equity or good conscience. "It is the notice of the use that is all the effect of the matter; for then he is *particeps criminis, et dolus et fraus nemini patrocinantur*, since in conscience he purchased my lands or my goods. For the common law whenever it found a consideration discharged the covin, but chancery looks further to the corrupt conscience of the party that will traffic for what in equity he knows to belong to another." Fonblanque's Equity, 151.

Conceding, however, that the title of *Washington* could be acquired by purchase adversely to the defendant in possession under a title, it is clear that nothing more than his rights were bought by the plaintiff. Considering the latter in the place and stead of *Washington*, the original owner, it remains to be ascertained what rights he has to the land in dispute against the defendant.

If we examine the validity of the acts under private signature on the ground, presented by the counsel for the plaintiff, we think the objections taken to their effect will be found to be untenable, whatever force they might have if taken in

favor of a *bond fide* purchaser without notice. It is said that these acts, being mere private writings, have no date against the plaintiff until their date is proved *aliunde*. But *Washington* in his receipt, and in the assignments of the land receipts to *Warren*, is a party to them, and in addition to article 2417, which provides that the parties to acts under private signature, their heirs, and assigns are as effectually bound by such acts as if they were in authentic form, article 2239 gives to acts under private signature, acknowledged by the party against whom they are adduced, between the parties who have subscribed it, their heirs and assigns, the same credit as an authentic act. Although writings of this class under private signature do not themselves make proof of the date of their execution against third persons, yet their date may be established by other evidence besides the actual proof of the time when they were executed. Pothier gives an example, where the contents of a private writing are mentioned in acts drawn by public officers, such as *procès-verbaux* of affixing the seals or inventories. Treatise on Obligations, § 715. This example, of the decease of the party, given by Pothier, is not exclusive, and any circumstance which renders the ante-dating of the writing impossible has been considered as giving effect to the date of the instrument, under the rigid system of evidence established by the Napoléon Code. 8 Toullier, 241. In the inventory of the *Ducker's* succession, made in 1838, and referred to in the *procès-verbal* of the sale, we find the land described as three lots of land lying on the bank of the Mississippi river adjoining *Daniel M. Bondurant*, entered by *H. F. Washington*, &c.

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The testimony of *Woodruff*, though indefinite by itself, points to the same conclusion, that the acknowledgment of *Washington* and the assignments of the land receipts found among *Warren's* papers after his decease, were genuine, and not ante-dated; and, we think, the evidence is conclusive against any right of *Washington* to claim the land in controversy. The document having the signature of *Washington* is, as we conceive, proof of a sale having been made to *Warren*, and its date, being subsequent to the sale from *Warren* to *Ducker*, is not material, as giving *Washington* any right adversely to the present defendant.

The writing under private signature from *Warren* to *Ducker*, bearing date August 1, 1834, is proved to have been executed at the time it bears date by one of the subscribing witnesses. Whether it conveyed the legal title to the land or an equitable title only, it is not material to enquire. The plaintiff claims in the right of *Washington*, and has no right to contest the title of the defendant under this contract between *Warren* and *Ducker*, as it stands executed between their heirs.

Considering, therefore, that the plaintiff, having due notice and actually knowing that the land in dispute belonged of right to the defendant, his mother, though technically the legal title was in the United States, she having been for several years previously in notorious possession thereof under a recorded title, if the purchase from *Washington* was not a piece of fraud and collusion between them, the only rights which the plaintiff could acquire being those of *Washington*, of whom he thereby became the assign, and *Washington* having no right whatever to the land in dispute, our judgment must be for the defendant.

The judgment of the District Court is, therefore, reversed, and judgment rendered for the defendant, with costs.

BROWN, for the use of &c. v. ROUTH et ux.

Where a plaintiff, in an action on a note given to him in pledge, admits, by a supplemental answer, defendant's right to pay the debt in the notes of a particular bank, and avers his readiness to receive them, but defendant makes no tender, and answers denying any cause of action against him, and plaintiff, in another supplemental petition subsequently filed, avers that he has become the absolute owner of the notes by purchase at a judicial sale, and withdraws his consent to receive payment in the notes of the bank, defendant cannot require that judgment should be rendered payable in the notes of the bank.

Where an act of mortgage does not contain the pact *de non alienando*, and the property is in possession of a third person, no judgment can be rendered for its seizure and sale in an action against the mortgagor alone.

APPPEAL from the District Court of Tensas, *Selby, J. Frazer, Farrar and L. Peirce*, for the plaintiff. *Prentiss, Stacy and Sparrow*, for the defendants. The judgment of the court (*Slidell, J.* not sitting,) was pronounced by *Eustis, C. J.* On the 22d March, 1848, judgment was rendered in favor of the plaintiff against *John Routh*, for the amount due on two notes, subscribed by said *Routh* and his wife, and a certain plantation and slaves, which had been mortgaged to secure the payment of the notes, was ordered to be seized and sold to satisfy the judgment. The suit against *Routh* and his wife to obtain judgment on the notes, and subject the mortgaged property to seizure and sale, was instituted, in June, 1843. *Mrs. Routh* died in 1845; the plantation and slaves having been purchased by her in the meantime, were inventoried as belonging to her succession, and have been in possession of her heirs since, they having accepted her succession with the benefit of inventory. From this judgment the defendant *John Routh*, has taken an appeal. An appeal is also taken by *John Routh* as administrator of the succession of his deceased wife, and by the heirs of *Mrs. Routh*, on the ground that they have been aggrieved by the judgment, though insisting that they were not parties to the suit in the District Court. The object of the appellants is to have the judgment against *Routh* changed so as to be made payable in notes of the Agricultural Bank of Mississippi, and the decree ordering the mortgaged property to be seized and sold, annulled; and to those points the argument of counsel have been confined.

The notes sued on originally belonged to the Agricultural Bank of Mississippi, to whose order they were made payable, and from whom the plaintiff acquired them. The modification of the judgment, which the defendant *Routh* insists on having a right to claim, is founded upon an admission contained in one of the several supplemental petitions filed by the plaintiff in the course of the proceedings in the District Court. *Routh*, in his answer, had pleaded, among various other matters, that any judgment against him must be rendered payable in these bank notes, and made oath, which was filed on the 18th June, 1844, that one of the partners of *Brown, Brothers & Co.*, who appear to be parties in interest in this suit, had entered into an agreement with him to compromise and settle this claim against him, the defendant binding himself to confess judgment for the amount thereof, payable in the notes and bills of the bank at par. The amended petition filed by the plaintiff's counsel on the 18th December, 1844, which is relied upon as establishing the right to have the judgment appealed from modified, is to this effect:

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"Plaintiff, by leave of the court first had and obtained, amends his petition, and admits that the notes herein sued on were pledged and delivered to him to secure a debt due from the Agricultural Bank. Plaintiff admits defendants' right to pay the same in the notes of the Agricultural Bank, but avers that defendant has never tendered the notes of said bank to pay this debt herein sued on; and avers that, in truth, the defendant is only endeavoring to delay the payment of the said debt. Plaintiff further avers that he is ready and willing to receive the notes of said bank in payment thereof, if the defendant will make a tender of the same to him; wherefore he prays for judgment etc., and for general relief in the premises."

To this the following answer was filed on the same day: "The defendants file this their answer to plaintiff's amended petition, and deny specially that the plaintiff has or can show any cause of action against these defendants; they allege that the assignment and transfer alleged by the plaintiff from the Agricultural Bank of Mississippi to plaintiff of the claims sued on was null and void, and made in direct contravention and violation of the positive statutes and laws of the State of Mississippi, where said bank is situated, and by whose laws said bank was chartered. Wherefore they pray that plaintiff's demand be rejected, with costs, and for general relief in the premises etc."

On the 6th of May, 1846, another amended petition was filed by the plaintiff to the following effect: "That since the institution of this suit *Brown, Brothers & Co.*, for whose use plaintiff sues, have become the absolute owners, by purchase at sheriff's sale, of the two notes heretofore pledged to them, and sued on in this suit. Petitioners retract and withdraw the consent heretofore made, that they would receive the notes of the pledgor, the Agricultural Bank, in payment for said debt, and pray for judgment for the amount of said notes, interest and costs against the defendants, and for general relief in the premises."

To this a still more formidable array of matter of defence was pleaded. The amended petitions were signed by the plaintiff's attorney, and it seems to us to be obvious that there is nothing in these matters which affect the original rights of the parties. The proceedings are very irregular, and we think it the duty of the court to take no heed of them. The plaintiff was undoubtedly willing, at the time, to take a judgment payable in the notes of the bank, provided they were forthcoming; but the defendants would neither confess judgment, nor tender the notes. The obligations, on their face, are payable in money; the right to pay in bank notes seems no part of the contracts. It may have been incident to it. An ordinary debt can be paid by compensation in the debt of the creditor, and when assigned in a debt of the assignee due to the party opposing it previous to the assignment; but the right of a debtor to pay a debt sued on by way of compensation can only be tested on a proper plea, and by the debtor who is the holder of the debt offered in compensation. The right of the defendant, acknowledged by the plaintiff's attorney, we consider amounts to no more than this; and as no notes were tendered or offered in payment, we think, the District Court did not err in rendering an absolute judgment against the principal defendant, *John Routh*.

The mortgage given by *Routh* to secure the payment of the notes of himself and wife to the bank, included a debt they owed to *Gordon & Coffey*, on which they had judgment, in 1842. On this judgment execution was issued, and the plantation and slaves was sold to *Mrs. Routh*, in October, 1843, for \$151,000, she paying the judgment debt, and retaining the balance due to the other mortgagees—

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the plaintiff's mortgage remaining entire, and thus being assumed by her, and forming part of the price of the property.

This change in the position of *Mrs. Routh*, by the purchase of the mortgage property, was the ground of an amendment to the original petition in which an additional liability on her part towards the plaintiff was alleged, and recourse claimed against her accordingly as before prayed for, which was for a personal judgment, and that the property mortgaged be seized and sold to satisfy the plaintiff's debt. This amended petition was served on *Mrs. Routh*, on the 8th February, 1845, but does not appear to have been answered, although, as we have seen, the amended petition filed subsequently, to wit, on the 6th of May, 1846, was answered.

On the 18th of February, 1848, a fourth supplemental petition was filed, alleging the death of *Mrs. Routh, &c.*, and the heirs and administrator of the succession were made parties to the original suit. Judgment for their virile shares, and for the seizure and sale of the property mortgaged, was prayed for. This, with a copy of the original petition, appears to have been served upon the several parties, and, on the 22d of March, 1848, a judgment by default was entered against all the defendants except *John Routh*, but which has not been made final. It follows, therefore, that, as to the succession of *Mrs. Routh*, the issues thus made having never been determined, are still pending. The judgment appealed from has settled the right of the plaintiff to his debt, and his remedy against the land and slaves mortgaged, and, so far as the defendant *John Routh* is concerned, he has no right to object to the legality of that part of the judgment, which subjects the property mortgaged to be seized and sold according to the prayer of the petition.

But the heirs object to the judgment which orders the seizure and sale of the property, of which they are in possession under the sheriff's sale, and which possession is declared upon in the supplemental petition of the plaintiff as an additional substantive ground of their liability for the plaintiff's debt. It is to be observed that one of the grounds of the defence of *Mrs. Routh* in her life time was, that she had renounced the community, and, at the time of the purchase at sheriff's sale, she was separated in property from her husband.

Cases are frequently presented before us in such a form that the application of the principles of law to them becomes difficult and embarrassing, of which this cause furnishes an example.

The mode of subjecting this property to the payment of the plaintiff's debt appears to be simple, provided the rules of practice are adhered to. It is clearly erroneous to have given a judgment against the property mortgaged in the possession of the heirs, by which it was ordered to be seized and sold on a judgment against *Routh*, who was not in possession, when the act of mortgage did not contain the pact *de non alienando*.

The district judge was of opinion that no other party than *Routh* was before the court on the trial of the cause, and it being so, although the judgment is valid so far as *Routh* is concerned, it seems to us that the seizure and sale of the mortgaged property could not be ordered under the state of the pleadings.

The plaintiff was bound to pursue the ordinary or the executory mode of proceeding. If he is held to the former, there are issues still pending between him and the heirs, which remain to be tried. Under the latter, the judgment, so far as it affects the heirs, cannot be maintained.

It is therefore decreed that, that part of the judgment which orders the seiz-

ure and sale of the property mortgaged, so far as relates to the heirs of *Mrs. Routh*, be reversed, and that, in other respects, it be affirmed; the plaintiff paying the costs of this appeal.

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ROUTH.

McCAUSLAND v. LYONS et al.

One, not a party to a promissory note, who puts his name on the back, will be bound as a surety.

Where two persons, not parties to a promissory note, write their names on its back, being bound as sureties, judgment will be rendered against them, *in solido*, for the whole debt. The obligation of each surety is to pay the whole debt; but this obligation is subject to the right to claim a division. Until this right is exercised, the obligation is *in solido*. C. C. 3018, 3019.

The exception of division by a surety is a peremptory one, which must be pleaded specially.

APPEAL from the District Court of West Feliciana, *Boyle, J. Paterson*, for the appellant. No counsel appeared for the defendants. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. *Lyons* and *Smith* are sued upon a note of the following tenor:

"On the 1st of April, 1843, we or either of us promise to pay to *Robert McCausland*, or order, the sum of two thousand and two hundred dollars, payable and negotiable at the Louisiana State Bank, at St. Francisville, bearing ten per cent per annum from maturity, until paid, it being for value received, this 1st day of April, 1842.

P. B. McKELVEY."

On the back of this note are the signatures of the defendants, "*H. A. Lyons* and *Ira Smith*."

The petitioner, who is the payee of this note, alleges that *Lyons* and *Smith* signed before the delivery of the note to him, and thus incurred the liability of sureties *in solido*. *Lyons* and *Smith* answered, admitting their signatures only, and pleading the general issue. The court below gave judgment in favor of the plaintiff against the defendants each for his virile share, and from this judgment the plaintiff has appealed, and asks that the judgment be amended so as to condemn the defendants *in solido*.

Our first enquiry is under what class of contracts does the obligation contracted by *Smith* and *Lyons* fall. This is answered by several decisions of our predecessors and of this court, which must be considered as settling the point in this State. By this irregular endorsement *Lyons* and *Smith* bound themselves as sureties. See *Smith v. Gorton*, 10 La. 376, *Laurence v. Oakey*, 14 La. 389. *McGuire v. Bosworth*, 1 An. 248.

Such being the character of the contract, our next enquiry is, are these sureties liable each for the whole debt, or is the liability merely joint. By article 2088 of our Civil Code (which is taken literally from article 1202 of the Napoléon Code,) it is declared that "an obligation *in solido* is not presumed; it must be expressly stipulated. The rule ceases to prevail only in cases where an obligation *in solido* takes place by virtue of some provision of law"—"ou la solidarité a lieu de plein droit, en vertu d'une disposition de la loi." It is therefore necessary to consider the nature of the contract of suretyship, for the purpose of determining whether it falls within the exception contemplated by the article.

The rule of the roman law was that, if several persons become sureties for one and the same thing, every one of them is answerable for the whole. Si

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plures sint fidejussores, quotquot erunt numero singuli in solidum tenentur. The benefit of division was not *ipso jure*, but might be demanded by a surety when his co-surety was solvent. *Inter fidejussores non ipso jure dividitur obligatio ex epistola Divi Hadriani; et ideo si quis eorum ante exaclam a se partem sine herede decesserit, vel ad inopiam pervenerit, pars ejus ad ceterorum onus respicit. Ut autem is, qui cum altero fidejussit, non solus conveniatur, sed dividatur actio inter eos, qui solvendo sunt; ante condemnationem ex ordine postulari solet.* See the text and notes of Domat, Surety, b. 3, tit. 4, s. 2.

The french Code followed the Institutes and the Code of Justinian, not however without previous opposition on the part of those juriconsults who desired to extend the rule of article 1202 to the contract of suretiship, and require an express undertaking to impose a liability *in solido*. That Code was thus made to harmonize with the roman law on this subject, and the opinions of Vinnius and Danneau, which were adopted by Pothier. See the history of the law on this subject as given by Troplong, Cautionnement, § 281 *et seq.* Pothier, Obligation, § 416. The latter considers the principle of solidarity as inherent in and derivable from the nature of the contract. *Il est de la nature du cautionnement de s'obliger à tout ce que doit le débiteur principal; et, par conséquent chacun de ceux qui le cautionnement est censé contracter cet engagement, à moins qu'il ne déclare expressément qu'il ne s'oblige que pour partie; c'est la raison qu'en rapporte Vinnius.* He then alludes to the exception of division accorded by the emperor Hadrian, and says it was adopted in the practice in France.

Our Code has adopted this principle; and so far as our present enquiry is involved, has substantially followed the law of Rome and France. "When several persons have become sureties for the same debt, each of them is individually liable for the whole of the debt, in case of the insolvency of any of them." Art. 3018. "Any one of them may, however, demand that the creditor should divide his action, by reducing his demand to the amount of the share and portion due by each surety, unless the sureties have renounced the benefit of division." Ib. "A creditor can by no means claim the whole sum from the surety who applied for a division, when the other sureties have become insolvent since the time of that application. The same thing takes place if the creditor has himself voluntarily divided his actions." Art. 3019.

The contract of suretiship, under these provisions of law, is of a mixed character. The obligation of each surety is to pay the whole debt; but this solidarity is tempered by the right of division. This right however, rests in *facultate*. The surety has the right to demand the division; but until the right is exercised, the obligation is solidary.

In the present case there has been no demand of division by the sureties. They were attacked by the plaintiff as debtors *in solido*, and pleaded the general issue. The exception is a peremptory one, which must be pleaded specially; and this has not been done in the court below, nor even in this court. *Dividitur obligatio inter plures fidejussores per exceptionem duntaxat, non ipso jure.* It is not an exception which can be supplied by the court. It is obvious that it presents a mixed question of law and fact. Suppose that Lyons or Smith had pleaded the exception of division. The plaintiffs might have met the plea by proving the insolvency of the other surety. See Troplong, Cautionnement, § 297, and the authorities there cited. Merlin, Rep. *verbo* Caution., § 4, no. 2.

It is therefore decreed that the judgment of the court below be reversed, and that the plaintiff recover from the said defendants Henry A. Lyons and Ira Smith,

in *solido*, the sum of two thousand two hundred dollars, with ten per cent interest thereon from the 4th day of April, 1843, until paid, and costs in both courts.

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LYONS.

THE STATE v. FARRON et al.

Though there be no proof that a judgment, rendered against the principal and surety in a bond taken by one of the recorders of the city of New Orleans for the appearance of the principal to answer a charge of assault and battery, was ever notified to the parties, it cannot be set aside, under the provisions of the stat. of 11 March, 1837, after the lapse of ten days from the date of an offer made, with the assent of the principal, by the surety, in court, to surrender his principal, and of an application by the surety for the cancelling of the mortgage resulting from the recording of the judgment in the mortgage office.

APPPEAL from the District Court of the First District of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Collens*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by *EUSTIS, C. J.* On the 10th of June, 1844, a judgment was rendered in the late Criminal Court of the First District, against *Farron* and *D'Hebecourt*, on a bond executed by them before one of the recorders of New Orleans, for the appearance of *Farron* to answer a charge of assault and battery.

On the 20th March, 1848, *D'Hebecourt* took a rule on the attorney general, in the First District Court of New Orleans, to show cause why he should not be discharged from the bond and judgment, on the ground that he, the surety, had made a formal surrender of the body of the principal to the sheriff in open court on the 17th instant, and that, even admitting the judgment to be legal and in due form, which was not conceded, the surrender was made in time, no notice of said judgment having been served on the appearer. The district judge having discharged the rule, after hearing the attorney general in opposition to the action of the court as invoked, the defendant, *D'Hebecourt*, has appealed. The decision of the district judge was founded upon the opinion that, the court had no power to release a surety against a judgment of the late Criminal Court, on a bond forfeited in 1844.

We have examined the different points presented in the argument of counsel, which we consider untenable. Under the law of 1837, a judgment of this description, rendered in the parish of New Orleans, could be set aside for proper cause, at any time within ten days after notice to the parties. It is admitted that, on the 13th of January, 1848, the defendant offered in open court to surrender his principal into custody, he the said principal thereunto assenting. It does not appear that the judgment ever was notified to the parties. But on this day, the 13th of January, 1848, an application was made by the counsel for *D'Hebecourt* for the erasure and cancelling of the judicial mortgage, recorded in the mortgage office, and purporting to be the record of a judgment rendered on the 10th of June, 1844, on the ground that no such judgment was rendered, or entered, on said day, or any other. This appearance of the defendant, and his application for relief from the mortgage resulting from the judgment, fully justified the district judge in his conclusion, that every thing had been done in accordance with law in the late Criminal Court, independent of the presumption which the law implies to that effect. Had the application been made to set aside this judgment within ten days from the day on which the appellant made the motion for the can-

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celling of the mortgage, a different question would have been presented. The judgment must, therefore, be considered as final, and in full effect.

We are by no means prepared to say that the appellant can be relieved against this judgment, by an ordinary action of nullity. Illegal and irregular as it is, it is still a judgment, and the State is the plaintiff. The remedy for the defendant is within the legislative power, and we are satisfied that it will not be withheld on a proper application.

Judgment affirmed.

HERRICK v. CONANT.

An appeal will not be dismissed on the ground of the record's not containing certain evidence adduced on the trial, where the defect was supplied, before the argument of the case, by an authentic copy of the document which was wanting, under an agreement in the court below that a copy should be furnished. The irregularity resulted from the plaintiff's consent, and it would be unjust to permit him to derive any advantage from a state of things he was instrumental in producing.

A confession of judgment, in an action on a partnership debt, made, after the dissolution of the partnership, by one of the members, is binding only on himself.

Where the principals in a bond are bound *in solido*, a judgment regularly obtained against either will be binding on their surety.

A judgment confessed by an insolvent after a *cessio bonorum* made and accepted, cannot affect the property ceded, which, from the time of the cession, was vested in the creditors; nor will such a judgment in favor of the vendor of moveables, who had sequestered them before the cession, confessed, after the cession, by the insolvent, who had released the property on a bond before his cession, be binding on the surety in the sequestration bond.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Van Matre*, for the plaintiff. *E. C. Mix* and *Roselius*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

EUSTIS, C. J. This is an appeal taken by the defendant from a judgment rendered against him as surety in a sequestration bond, dated the 15th of November, 1845. The bond was given in the suit of the plaintiff against *Barton & Reed*, to release certain articles being their stock in trade in Poydras street, and at their camphine factory in Girod street.

There was a motion made by the counsel for the plaintiff and appellee to dismiss the appeal, on the ground of the record being defective, it not containing certain evidence adduced on the trial. The defect was supplied before the argument of the cause, by an authentic copy of the document which was wanting. It was agreed, in the court below, that a copy was to be furnished, and the irregularity results from the plaintiff's consent. It would be unjust to permit him to derive any advantage from a state of things which he was instrumental in producing.

The bond was intended to secure the delivery of the articles sequestered, and the question before us is whether it has been forfeited. *Welsh v. Barrow*, 9 Rob. 535. The plaintiff had judgment against *Barton & Reed*, on the confession of *Barton*. The partnership between these parties having been previously dissolved, *Barton's* confession of judgment can only be held binding on himself; but as *Barton & Reed* were bound *in solido* in the bond, a regular judgment against either would be binding on the surety. It is objected by the counsel for the defendant, that this judgment is not binding on the defendant, and does not conclude his liability on the bond, because, at the time the confession of judgment

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was made, *Barton* could not by such an act affect in any manner the property sought to be made liable to the plaintiff's claims. The judgment was rendered on the 26th of May, 1846, for the debt claimed, with the vendor's privilege on the articles sequestered. On the 30th of March previous, *Barton*, in consequence of the seizure of his stock, had made a cession of the partnership effects, including these very articles, for the benefit of their creditors; which cession was duly accepted, and a provisional syndic was appointed under the authority of the late court of the First Judicial District. The property *Barton* had in those articles was from that time vested in his creditors, and he could not confess any judgment which could affect them in any legal sense. The judge of the District Court would not have permitted a judgment of this kind to be entered; and it was solely from the circumstance of the judge of the Criminal Court, in which court the judgment was taken, being uninformed of the proceedings in the District Court, that the defendant, *Barton*, was held competent to confess a judgment against moveables of which he had divested himself by judicial proceedings. A judgment, rendered under these circumstances, we consider as not binding on the surety. Pothier on Obligations, 816, § 61. *Clarke v. Scott*, 2 An. 907.

The judgment of the District Court is therefore reversed, and judgment rendered in favor of the defendant, with costs in both courts.

FRIERSON v. IRWIN.

A commission directed to *E. R. Clyde*, but executed and returned by *Robert J. Clyde*, as commissioner, will be admissible, where the attorney by whom the commission was taken out makes oath that he is well acquainted with *Robert J. Clyde*, that he was the person intended to be made the commissioner, that he caused the name of *E. R. Clyde* to be inserted in the commission by mistake, and that there is no other person of the name of *Clyde* in the town to which the commission was directed.

The designation of a commissioner to take testimony by the initials only of his first and second names, though his surname be in full, is irregular; and should be objected to by the opposite party before adding his cross-interrogatories.

A PPEAL from the Second District Court of New Orleans, *McHenry, J.* presiding. *Elmore and King*, for the plaintiff. *Griot and Roselius*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

EUSTIS, C. J. This appeal is taken by the defendant from a judgment by which the plaintiff recovered from him a slave named *Sam*, and fifteen dollars per month from 1st March, 1847, and the defendant recovered from his warrantors the sum of \$290, the price paid by him for the slave, with interest.

The case has been argued at length on the merits, which involve questions under the jurisprudence of the State of Alabama. Independent of certain testimony, which was excluded by the District Court, we are not prepared to determine definitively on the rights of the parties, and we have come to the conclusion that it ought to have been admitted.

On the trial of the cause the plaintiff's counsel offered in evidence the depositions of three witnesses, taken under a commission, which appears to have been executed by *Robert J. Clyde*, of Tuscaloosa, in the State of Alabama. The

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commission was directed to two persons, justices of the peace, or to *E. R. Clyde, Esq.*, at Tuscaloosa, Alabama.

By the return to the commission, the depositions appear to have been taken under it at the office of the commissioner, in Tuscaloosa, by *Robert J. Clyde*, who signs the return as commissioner. The objection, which the court sustained, to the admission of these depositions was, that *R. J. Clyde* had no authority to take them under the commission, it having been directed to *E. R. Clyde*. On the objection being made, the counsel for the plaintiff submitted his affidavit to the court to the effect that, he was well acquainted in the town of Tuscaloosa, and with *Robert J. Clyde*, the commissioner; that he, *Clyde*, was the person intended to execute the commission, because he, the counsel for the plaintiff, on the issuing of the commission gave the name *E. R. Clyde*, erroneously, for *R. J. Clyde*.

To the decision of the court, the counsel took a bill of exception. The designation of the person to execute the commission by his name, *Clyde*, is that upon which the court is authorized to act. The addition of the initials merely of the christian and middle names is an irregularity almost necessarily leading to mistakes, which the defendant ought to have objected to specially before the cross-interrogatories were filed.

Mr. King states in his affidavit, not only that the person executing the commission was the person intended, but that there is no other person living in Tuscaloosa of the name of *Clyde*, and that, if there were, he thinks he should have known it. We think the court erred in refusing to admit the depositions taken under the commission.

The irregularity of designating the commissioner by the initials of his christian and middle name, may be considered as having been committed by both parties, and can be taken advantage of by neither.

The judgment of the District Court is therefore reversed, and the case remanded, with directions to receive in evidence the depositions returned under the commission mentioned in the bill of exceptions; and it is ordered that the appellee pay the costs of this appeal.

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THE FIRST MUNICIPALITY v. DEVRON.

The ordinance of the Council of the First Municipality, of 16 February, 1846, imposing a fine on persons selling groceries in certain market-houses of that municipality, is neither illegal nor unconstitutional.

APPEAL by defendant from a judgment of a Justice of the Peace in New Orleans. *Preaux* and *Morel*, for the plaintiffs. *Redmond*, for the appellant. The judgment of the court (*King*, J. absent,) was pronounced by

EUSTIS, C. J. This is an appeal from a judgment rendered by a justice of the peace, by which the municipality recovered the sum of fifteen dollars from the defendant, being the amount of a fine incurred under an ordinance approved the 16th of February, 1846, which imposed a fine on persons selling groceries in the markets.

We perceive nothing unconstitutional or illegal in this ordinance.

*Judgment affirmed.**

*A similar judgment was pronounced, at the same time, in a second case between the same parties, for another fine of fifty dollars.

SUCCESSION OF LOGAN.

Decision on *Ducournau v. Levistones*, 2 An. 245, affirmed.

APPEAL from the Second District Court of New Orleans, *Canon, J. Sever*, for the appellant. *T. H. Howard*, contra. The judgment of the court (*King, J. absent*,) was pronounced by

SLIDELL, J. In this case the transcript not having been seasonably filed, and no application for time having been made, the motion to dismiss must prevail. It appears by the affidavit of the appellant's counsel, that the omission was attributable to a mistake on his part. But this is not a ground for relief. See *Ducournau v. Levistones*, 2 An. 245; *ante* p. 30.

Appeal dismissed.

JONES v. LAWRENCE.

A third opponent cannot arrest the sale of the property in dispute, nor claim damages against the sheriff for executing the judgment, unless he obtain an injunction, and give security. C. P. 399.

Where the principal demand has been tried, no further proceedings can be had on the intervention. The intervenor must be held to have abandoned that remedy.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Peyton*, for the plaintiff. *Prentiss and Finney*, for the intervenor, appellant. The judgment of the court (*King, J. absent*,) was pronounced by

ROST, J. The plaintiff sued out against the defendant an attachment, under which a slave in his possession was levied upon. *Smiley* then intervened, claiming the slave under a deed of trust alleged to have been executed, and duly recorded, in Tennessee, by *Lawrence* and his wife, before the institution of this suit. He was represented by *Messrs. Edwards and Barker*, the defendant's counsel.

On the trial of the cause, these counsel having absented themselves, and not being found in the court-buildings, the plaintiff proved his claim, and submitted the case. The judgment of the court was in his favor for the sum claimed, with privilege and preference on the property attached. Some time after the judgment had been signed, the intervenor, by his present counsel, filed a supplemental petition, alleging that his claim under the original petition remained undetermined. He prayed that his original and supplemental petitions might be considered as parts of each other; that the sheriff, who was then in possession of the slave under an execution, and also the plaintiff, *Jones*, be cited, and that the slave seized be adjudged to belong to him, the said *Smiley*. He subsequently filed another supplemental petition, alleging that the slave attached was worth \$1,000, and praying that in case the slave could not be found, *Jones*, and the sheriff be condemned, *in solido*, to pay him that sum.

The plaintiff and the sheriff both excepted to these petitions, on the following grounds: 1st. That a final judgment was rendered in favor of the plaintiff against the defendant, with privilege and preference on the property attached. 2d. That

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the supplemental petitions are a part of, and intended to revive and continue, the original petition of intervention. 3d. That, if the intervenor has any claim to the slave, he cannot assert the same as he has done. The District Court having sustained the exceptions, and dismissed the petition of the intervenor, he appealed.

Parties are permitted to intervene, for the preservation of their rights, in suits between other persons, on the express condition that the intervention do not retard the principal suit. The intervenor must be at all times ready to plead and to exhibit his testimony, and, under an express provision of the Code of Practice, the demand in intervention must be decided at the same time with the principal demand. C. P. 391, 154.

It is urged that the court ought to consider the nature of the proceeding, not its name; and that the supplemental petitions filed were in reality a third opposition, under arts. 395 and 398 C. P.

We are unable to view them in that light. Daily experience teaches us that justice cannot be administered, unless the different remedies which the law gives are kept distinct from each other. In this very case, injustice would be done if this rule was not adhered to.

If the proceeding be an intervention, the prayer that the sheriff and the plaintiff be made to pay the value of the slave unless they restore her, is proper; but in a third opposition, the party has no right to arrest the proceeding, or claim against the sheriff for executing the judgment, unless he obtains an injunction and gives security. C. P. 399.

It is further urged that, conceding that the intervention should have been dismissed on account of the absence of counsel, it was not so dismissed by the judgment of the court; and that, being still pending, the intervenor is entitled to have it tried. We are of opinion that, under art. 154 C. P. already cited, when the principal demand has been tried, no further proceedings can be had on the intervention, and that the intervenor must be held to have abandoned the summary remedy to which he had resorted. There is no error in the judgment dismissing the intervention.

Judgment affirmed.

SALTER et al. v. DUGGAN et al.

A provisional seizure may be dissolved summarily by a rule to show cause, where the apprehensions of the plaintiff, which led to the seizure, is clearly proved to be unfounded.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Schmidt*, for the appellants. *Bradford*, for the defendants. The judgment of the court (*King, J.* absent,) was pronounced by

SLIDELL, J. This action was for the amount of work and materials done and supplied for the owners of the *Wave*. A personal judgment was claimed, and also a decree of privilege upon the vessel. A provisional seizure was obtained, which, upon rule, the district judge dissolved, the testimony disproving the alleged intention to remove the vessel. To the admission of this testimony the plaintiff excepted, "on the ground that there is no law authorizing a defendant in such case to disprove, in this summary manner, the plaintiffs' declaration under oath." It will be observed that the rule taken, and the testimony adduced,

did not go to the main action, but simply to the plaintiffs' right to a conservative process, by which he desired to protect an alleged accessory of his claim. Considering the severe nature of the proceeding, which anticipates the ordinary course of the law, and deprives the defendant of the possession of his property before judgment, upon the *ex parte* showing of his adversary, we think it is proper to grant a summary hearing upon rule, and to relieve the defendant from the seizure, where the apprehension of the plaintiff is clearly proved to be mistaken or unfounded. The main action is undisturbed, and is left to be tried in the ordinary form.

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DUGGAN.

Judgment affirmed.

SHORT v. THE CITY OF NEW ORLEANS et al.

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Novation can only be established by an express declaration to that effect, or by acts tantamount to such a declaration. The attending circumstances must be weighed with exactness, to ascertain whether the parties have really intended to make a novation and release the original debtor.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Denis*, for the plaintiff. *Morel*, for the appellants. The judgment of the court (*King, J. absent*.) was pronounced by

Eustis, C. J. The plaintiff alleges that he was, in 1845, the owner of certain *coupons* of interest due on bonds issued by the corporation of the city of New Orleans; that to provide for the payment of these *coupons* the mayor drew his three drafts, in different sums, on each of the municipalities; that the draft for the proportion of the Third Municipality was for the sum of \$301 70, payable one year after date, and, after having been accepted by the treasurer of the municipality, was protested for non-payment, of which the drawer had notice. The plaintiff brought his suit against the Third Municipality and the former corporation of New Orleans, and obtained judgment against each for the amount of the draft, with costs. The parties representing the latter corporation have appealed.

The principal ground of defence presented in the written argument of counsel is, that a novation of the original debt had been produced, by the surrender of the *coupons* and taking the drafts on the municipalities, and that thereby the original debtor is released.

The very argument that a novation has taken place, seems to us to exclude the conclusion that the old corporation was not bound on the draft which the creditor received as an equivalent for the obligations of the corporation which he surrendered. Without an express declaration to that effect by the creditor, or acts tantamount to such a declaration, it can never be held that an original debtor is released. This rule is well settled, and is always adhered to in questions occurring in the changing of debts. Courts are bound to weigh with exactness all the attending circumstances of transactions of this kind, in order to ascertain whether the parties have really intended to make a novation of their debts, and to release the original debtors by the substitution of others. *Pardessus, Droit Commercial*, vol. 2, § 221. Not that we consider any responsibility attaches to the old corporation from the signature of the mayor to the draft as an ordinary commercial instrument, because it is not of that character, nor has any authority

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been shown to bind that corporation in that form; but, from the whole transaction, as it is before us in argument, we think the original debt has not been changed, and the original party to be liable.

Judgment affirmed.

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STOCKTON v. CRADDICK.

An attachment by a creditor of a fraudulent vendee of real estate, not proved to have had notice of the nature of the vendee's title, levied on the property while in the possession of his debtor, will hold the property against creditors of the fraudulent vendor.

APPPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. *Stockton*, plaintiff, *pro se*, and *Steel*, who was with him, in support of plaintiff's right, cited 11 La. 408. 15 Vesey jr. 331. 13 La. 126. 8 La. 14. 16 Peters, 14. 2 An. 196, 249.

Benjamin and Micou, for the appellants, *Hyde and Clapp*. If *Stockton* had purchased the property from *Craddick*, for a valuable consideration, on the faith of his apparent title, and without notice of the fraud; if he, had under similar circumstances, loaned his money to *Craddick*, on a mortgage of the property, or if, in any manner whatever, he had trusted the apparent owner, under the title, he would undoubtedly be entitled to the favor of the court, and the protection of the principle of law on which he relies. But this principle has no application whatever, to the case of *Stockton*. To ascertain his real position, interrogatories were addressed to, and answered by, him. We are quite willing to take his own statement on this point. To these interrogatories he answered that: He became owner, in the State of Mississippi, of the notes which are the basis of the suit no. 3368, just before the filing of said suit, that is only a few days before the said filing; and of the note which is the foundation of suit no. 3402, only a few days before the filing the petition therein; the precise day he acquired said notes does not now recollect. He obtained all said notes from one *Abram B. Reading*, then, and, as affiant believes, now a resident of the city of Vicksburg, and State of Mississippi. He did not pay any money for said notes—for the notes which are the foundation of suit no. 3368, he agreed with said *Reading* to pay him eighty cents on the dollar, and for the other note which is the foundation of the suit no. 3402, affiant agreed with said *Reading* to pay him sixty cents on the dollar, and it was also agreed by and between him, affiant, and the said *Reading*, that affiant was to make him said *Reading* no payment for any of said notes until after affiant should have realized said claims against *Craddick*. This is stated according to the best of affiant's recollection and belief. He is the sole owner of said judgment, and of the notes on which it is founded; and there is no other person either directly or indirectly interested with him in the ownership of said judgments, or said notes, nor is there any one who has any lien, or privilege, or claim of any kind on said notes, nor has the rights of said *Reading* to receive and recover the full amount of said notes from *Craddick* ever been questioned, (so far as affiant knows,) before they became the *bona fide* property of affiant. A few days before he purchased any of said notes, he learned by inspection of the books of the conveyance office of New Orleans, that *Craddick* was then owner, by conveyance to him, of four lots and a fraction of ground, and of the house thereon, in Delord street, in New Orleans, of which the lots now claimed by *Hyde & Clapp* were two—affiant cannot recollect the precise number of days which elapsed from the time he acquired his knowledge, till he became owner of the notes. Affiant verily believed at the time he became the owner of said notes, that said *Craddick* was the real and *bona fide* owner of all said lots of ground in New Orleans, and he so informed said *Reading* at the time. As well as he can now recollect, he knew *Joseph N. Craddick*, the defendant, by sight, only for a year perhaps before he became owner of the said notes. Affiant has no personal knowledge of the pecuniary circumstances of said *Craddick*; he was at one time in good credit in Vicksburg; but before affiant became the owner of said notes he had lost credit, and affiant was informed money could not be readily made out of him on execution in Mississippi. Affiant cannot say of his

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own knowledge if he, said *Craddick*, is, or is not, insolvent, but affiant believes he is insolvent; and that he was so reputed in Vicksburg, before affiant became owner of any of said notes, but for what length of time before that period affiant cannot say. He is now, and was then, but very illy informed as to the circumstances of said *Craddick*."

Stockton is not then a purchaser; he is not a creditor upon a new consideration, given on the faith of the paper title, and therefore does not come within the rule on which he relies. That rule is thus laid down in 1 Story's Eq. Jur., sec. 381. "In concluding this discussion, so far as it regards creditors, it is proper to be remarked, that though voluntary, and other, conveyances in fraud of creditors, are thus declared to be utterly void; yet they are so far only as the original parties and their privies, and others claiming under them, who have notice of the fraud, are concerned; for *bona fide* purchasers for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration, that they will be protected, as well at law as in equity, in their purchases. It would be plainly inequitable, that a party who has *bona fide* paid his money, upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity; since it would be impossible for him to guard himself against such latent frauds. The policy of the law, therefore, which favors the security of titles, as conducive to the public good, would be subverted, if a creditor having no lien upon the property, should yet be permitted to avail himself of the priority of his debt, to defeat such a *bona fide* purchaser. Where the parties are equally meritorious, and equally innocent, the known maxim of courts of equity is, *qui prior est in tempore, potior est in jure*; he is to be preferred who has acquired the first title."

In no treatise or case, do we find the rule otherwise laid down. It is always said to be applicable only to *bona fide* purchasers, upon a valuable consideration, and without notice. In *Fletcher v. Peck*, 6 Cranch, 133, Ch. J. Marshall, in giving the reason of the rule, says: "He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others; and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned." Chancellor Kent, having held in *Roberts v. Anderson*, 6 Johns Ch. R. 371, that even a *bona fide* purchaser under a fraudulent sale, would not be protected against creditors, the doctrine was carefully reviewed by Judge Story, in *Bean v. Smith*, 2 Mason's R. 272. He contends that the rule protects against creditors as well as others, but he lays it down with the same care as in his commentaries. The price paid, the valuable consideration, is every where urged as the reason of the rule—the ground on which the equity of the purchaser, is held superior to the equity of the creditor. See also 2 Vesey, jr., 458. 8 Mart. N. S. 342. 1 Mart. N. S. 387.

But, on the other hand, it is equally well settled, that the rule does not apply to a mere creditor of the party, who receives a fraudulent title, without giving any new credit, or new consideration on the faith of the title. "A plea of purchase for a valuable consideration, will protect a defendant from giving any answer to a title set up by the plaintiff, but a plea of bare title only, without setting forth any consideration, will not be sufficient for that purpose." *Walwyn v. Lee*, 9 Vesey, jr., 24.

"The rule adopted in England in favor of *bona fide* purchasers, without notice, is founded, as we have seen, upon a general principle of public policy. *Walwyn v. Lee*, 9 Vesey, jr., 24. It is not, however, absolutely universal; for it has been broken in upon in two classes of cases. In the first place it is not allowed in favor of a judgment creditor, who has no notice of the plaintiff's equity. This appears to proceed upon the principle, that such judgment creditor shall be deemed entitled merely to the same rights as the debtor had, as he comes in under him and not through him, and upon no new consideration like a purchaser. *Burgh v. Burgh*, Rep. Temp. Finch, 28. In the second place, &c." Note to s. 410, 1 Story's Equity.

No case has been cited by the appellee, nor have we met with any even apparently changing the doctrine thus precisely laid down, except that of *Foster v. Foster*, 11 La. Rep. 401. In that case, *Thomas Foster* having made a fraudulent conveyance to *Leri Foster*, the latter granted a new mortgage for a pre-existing debt of one *William Seay*. The court placed this mortgage upon the footing of a sale, for a valuable consideration, and held that mortgagee should be equally protected, with a *bona fide* purchaser. The court may have considered

STOCKTON v. **CRADDICK.** the mortgage for another's debt, as a new contract; time or indulgence may have been given to the original debtor, constituting a consideration for the mortgage, but neither of these reasons is stated in the opinion. Nor does the judge seem to intend to lay down any new rule, or to extend the operation of the rule beyond its well known limits. We can only conclude, that there were circumstances in the case which produced their influence on the mind of the court, but which are not reported, or else that the court unadvisedly made a wrong application of a known and familiar principle. Certainly the court did not intend to say, that a mere change in the security, by creating a lien upon a property fraudulently acquired, placed the creditor in a better position than those who had been despoiled by the fraud. It is true "that third persons acting in good faith, shall not be prejudiced by the frauds of others, in which they had no agency or concern," but it is equally certain that they cannot be enriched by such frauds, at the expense of others innocent as themselves. It is more reasonable to believe, that the court was influenced by circumstances not reported, than that it was extending, unconsciously, the limits of a rule, founded on public policy, and intended strictly for the protection of those who advance their money, or make new contracts, on the faith of a recorded title. The case does not by any means go to the extent necessary to support *Stockton's* claims. Although a mortgage may be treated as an alienation, and the mortgagee be placed on the footing of a purchaser, it can hardly be contended that an attachment, is either a mortgage or a sale. If that opinion intended to establish even the naked proposition, that a mortgage for a precedent debt, without any new credit or consideration, is to be protected like a sale for a price actually paid, it stands alone, and finds no support either in reason or authority.

But there is still another point, in which this rule must be examined. It is applicable only, to those who have no notice of the fraud, either actual or constructive. Those who were put upon their guard, or upon enquiry, cannot plead ignorance of the fraud, or protect themselves, even where they have advanced their money on the fraudulent title; "whatever is sufficient to put a party upon enquiry, is, in equity, held to be good notice to bind him." 1 Story's Equity, sec. 400.

Stockton tells us that he had no knowledge of the fraud committed by *Craddick*, but he knew that *Craddick* was insolvent, or was generally reputed so to be. When he found on the records, in New Orleans, a sale to such an insolvent person, for a nominal consideration of \$16,000 in cash, he might well be considered as put on his guard. He appears to have received a transfer of the notes sued on, in consideration of attempting an attachment at his own expense, and of a promise to divide the spoils with the former holder, if any thing should be realised. How can a litigant, thus situated, claim the equitable protection which the law gives to innocent purchasers? *Hyde & Clapp* trusted *Hall*, on the credit which the possession of the property gave to him. It became the pledge of the creditors of *Hall*. It was sold under execution for his debts, and is in possession of purchasers in good faith, and upon a valuable consideration.

The judgment of the court (*Rost*, J. absent,) was pronounced by

EUSTIS, C. J. This suit was instituted, in January, 1841, and was commenced by attachment against certain lots in New Orleans, as the property of the defendant. Judgment was rendered for the plaintiff, with privilege on the property attached, in February, 1842. Execution having been issued on this judgment, and the lots having been advertised for sale, the proceedings were enjoined at the instance of *T. R. Hyde & J. S. Clapp*, who claimed the lots as their property, having purchased them at a sheriff's sale, at which they were sold under executions against *J. J. Hall*. On a hearing, the injunction was dismissed, and *Hyde & Clapp* have appealed.

This case has been already once before this court, and is reported in 1st An. p. 40. It is now before us in the form of an opposition to the plaintiff's execution, called in our Code of Practice, the third opposition. An episode of the case is also reported in 10 Rob. 387. *Hyde et al v. Craddick*.

After the issue was joined on the original opposition, a supplemental petition was filed by *Hyde & Clapp*, in which it is alleged that the plaintiff is an attor-

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ney and counsellor at law, licensed to practice in the several courts of this State, and that, at the time he purchased the claims on which he obtained the judgment against *Craddick*, he was practising in the late Commercial Court of New Orleans, in which the judgment was rendered, and that so far as said claims affect the rights and property afterwards purchased by the opponents they are litigious, and the sale of them to the plaintiff is absolutely null. Interrogatories were propounded to the plaintiff, who fully answered them; but we do not find that any answers was filed to the supplemental petition, though an exception was filed to it, which was afterwards withdrawn. We cannot consider this important allegation as admitted; but, as the cause was tried on its merits, we must hold it to have been at issue, under the answer of the plaintiff to the opposition filed by *Hyde & Clapp*.

The allegation relating to the plaintiff's being a practising lawyer in the court, in which the attachment was instituted at the time alleged, is not proved. He had been previously admitted to the bar in this State, but we have nothing before us on which any other place of residence or business can be assigned to him than is alleged in the petition for the attachment, which is Vicksburg, in the State of Mississippi.

It appears that the plaintiff acquired the notes sued on from one *Reading*, and, on being interrogated under oath, he states that he had learned, by inspection of the books of the register of conveyances in New Orleans, that *Craddick* was the owner of the lots attached previous to his purchasing the notes, and that he verily believed, at the time of the purchase, that *Craddick* was their real and *bonâ fide* owner, and he so informed *Reading* at the time.

Craddick held the lots under a fraudulent title. *J. J. Hall*, an insolvent debtor, had conveyed them to *C. C. Hall*, in July, 1839, who, on the eve of absenting himself, left a power of attorney to sell them, with his wife; she conveyed them to *Robert Mott*, who took the title at the instance of *Craddick*, under the conviction that the conveyance was made for the purpose of securing the rights of the wife of *J. J. Hall*, who was *Craddick's* daughter. *Mott*, as well as *Craddick*, resided at Vicksburg, at this time; and, on finding soon after the title was made to him, that one of the *Halls* was in jail and the other had absconded, he insisted on *Craddick's* taking the title out of him, which was accordingly done, by a transfer to *Craddick*, of the date of the 14th July, 1840.

The opponents, *Hyde & Clapp*, are judgment creditors of *J. J. Hall*, and, after the plaintiff's attachment had been levied on the lots, they instituted their revocatory action to subject the property to their execution, on the ground of the fraud in the title to *Craddick*, and it was so decreed. Under this judgment execution was issued, the lots were sold under execution, and the opponents became the purchasers. This judgment was reversed on a matter of form—but a subsequent judgment was rendered, by which *Craddick's* title was decreed to be fraudulent and simulated.

The question, as it has been presented to us in argument, and it embraces the substantial merits of the cause, is, as to the liability of this property to be attached by the creditors of *Craddick*, while this fraudulent title was subsisting. We think there is no evidence charging the plaintiff with notice of the character of this title, and the matter is therefore reduced to a naked question of law.

The district judge gave the plaintiff judgment, which held the property subject to the creditor's attachment, under the authority of the case of *Foster's heirs v. Foster's administrators*, 11 La. 408.

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In that case it was held that, where a fraudulent vendee of slaves, under a title valid in point of form and having the appearance of verity and good faith on its face, mortgages them to an antecedent creditor, who is ignorant of the fraud, his right will not be affected by the fraud between the original parties to the sale; and, on this ground, the verdict of a jury was reversed, and the judgment was given in favor of the mortgagees, in accordance with the views of the court on the matter of law. This decision appears to us to be in harmony with article 2236 of the Code, which provides that counter-letters can have no effect against creditors or *bond fide* purchasers, being valid as to all others. We have not been able to find any decision in which the rule in this case has been impugned, and the title having passed out of *Hall*, and, by intermediate conveyance, to *Craddick*, and the latter being in possession of the property at the time of the attachment, the present case comes clearly within it. *Williams v. Hagan*, 2 La. 123. *Syndic of McManus v. Jewett*, 6 La. 531.

*Judgment affirmed.**

* *Benjamin and Micou*, for a re-hearing. The fraud in *Craddick's* title has been twice pronounced. The plaintiff does not contest or deny the existence of this fraud, and yet he contends that, as a creditor of *Craddick*, he has a right to profit by it, and subject the property to his attachment. The question then presented, is between the creditor of *Hall*, and the creditor of *Craddick*. The property really belongs to *Hall*, but *Craddick* has the fraudulent title. The creditor of *Hall* claims, because the property belongs to his debtor; the creditor of *Craddick*, because his debtor has accepted and recorded a fraudulent title. Supposing them equally innocent, the decree in favor of the latter gives effect to the fraud. The fraud, which despoils one creditor, enriches another. It is not the case of an innocent purchaser, or of a mortgagee who pays or lends his money on the faith of a solemn and recorded title. It is the naked case of the creditor of an insolvent, attempting to obtain payment of his debt, through the fraud of his debtor, at the expense of innocent creditors of another fraudulent debtor.

I. Our first position is, that the title of *Craddick*, being fraudulent, was, so far as the creditor of *Hall* were concerned, void *ab initio*, and could give no rights to the creditors of *Craddick*.

The general rule that whenever a party may sell, his creditors may attach, does not contemplate the case of possession obtained by fraud. With regard to personal property, it was formerly held, that the attachment would lie except when the property had been procured by a felony; but this rule has been modified, and it is now well established that, if possession be obtained by fraud or imposition, the original owner may recover his property. Such is the rule laid down by Judge Story in *De Wolf v. Babbe*, 4 Mason, 294, and followed by the late Supreme Court in *Gaugue v. Johnson*, 2 La. 516. In the latter case, possession had been obtained on the faith of a letter of credit, which had been revoked. The court held that, the use of such a letter, after it was recalled, was equivalent to forging a new letter; and, although the merchandise had been brought from Philadelphia to New Orleans, by the defendant in attachment, the vendor recovered against the attaching creditor. So in *Prall v. Lee*, 3 La. 282, the court say that the fraud charged by the petition, and found by the jury, was sufficient to authorize the court to consider the sale in question void *ab initio*, and not transulative of property. It is only when the vendor has voluntarily parted with the possession, that his equity is not equal to that of a *bond fide* purchaser for a valuable consideration. *Russell v. Fawcett*, 18 La. 589. *Marks v. Landry*, 9 Rob. 526.

In all these cases, the contest was between the owner and attaching creditors or purchasers. But if the owner in such cases could recover, his creditors have still a higher right. The owner may be charged with imprudence, at least, in permitting possession to be obtained by false pretences; but the charge will not lie against creditors, who cannot, by any possibility, prevent their fraudulent debtor from secreting his property. His combination with another to defraud them, is independent of any action, or even knowledge, on their part. The parties who conspire are in fraud, but the creditors are innocent. If then, by such fraudulent conspiracy, the possession or title to the property passes to a fraudulent vendee, the sale must be considered void, *ab initio*, as to creditors, and not transulative of the property. Such is the rule applied in England, and in the courts of the United States. The stat. 27 Eliz. c. 4, declares, that fraudulent conveyances may be avoided by creditors, unless the property shall have passed to an innocent purchaser for money or other good consideration. Sugden on Vendors, c. 16, p. 416. The rule that is constantly applied in the chancery courts is the same; and when such fraudulent conveyances were attacked by creditors, they have been repeatedly decreed void, *ab initio*, as to their effect upon the parties defrauded. "A deed founded in actual and positive fraud, as being made under the influence of corrupt motives, and with the intention to cheat creditors, may be considered void *ab initio*, and never to have had any lawful existence." Thompson, C. J., *Murray v. Rags*, 15 Johns. 586. *Osborne v. Moss*, 7 Johns. 164.

The distinction between a void deed and one only voidable has been repeatedly and learnedly discussed. *Mackie v. Cairns*, 5 Cowen, 779. *Henriques v. Howe*, 2d ed. Ch. R. 122. We do not enter into it, because it is deemed unnecessary in the present argument. The deed may be good between the parties, yet if it is fraudulent as to creditors, if it is attacked by them and set aside, the nullity is retro-active. The fraud being established, the convey-

ance is treated as if it had not existed. Whatever may be the distinctions between void and voidable, the judges all concur in this result, that the fraud once shown, although the parties may be bound, the deed is void as to creditors. Neither the courts of common law nor chancery allow any exception to this rule, except in favor of a *bona fide* purchaser, for a valuable consideration. "And by the civil law, whatever debtors do to defraud their creditors is void, and there is a great resemblance between the civil law in this matter, and the statute of 13th Eliz." 1 Fonblanque's Equity, b. 1, ch. 4, s. 12, p. 204.

To the same purport is our own legislation. The Code gives to the creditor, his action to "annul." Art. 1965. And, if his action be maintained, the decree is, that the contract be "avoided as to its effects on the complaining creditor," &c. Art. 1972. The liability to attachment for debts of the fraudulent vendee, is one of the effects of the conveyance. The attaching creditor gives no consideration, for the right which he claims to exercise. He comes in under, and not through, the vendee. He seeks to avail himself of the interest of the debtor in the thing. If he had paid value for it, or advanced his money upon mortgage, his case would depend on other principles. But he seeks to avail himself as a creditor, of an apparent right of his debtor, and is met with proof that the right is not real, and is based in fraud. The positive language of the law then applies. The creditors who have been defrauded, are to be redressed. The title of the defendant in attachment is annulled; it is decreed void *ab initio*, as to the injured creditors, and the attachment necessarily falls, with the title or interest on which it was based. That an attaching creditor can stand on no better footing than his debtor, see *United States v. Vaughan*, 3 Binney, 400.

II. The registry laws, which declare that no act shall take effect against third persons unless recorded, are supposed to support the claims of the attaching creditor. We propose to show that such laws are not applicable to the case.

We hold, that these laws are simply intended to enforce publicity of transfers; and, for that purpose, they impose upon every purchaser the necessity of diligence in inscribing his act, at the risk of losing his property. In the two cases cited in the opinion of the court, this heavy penalty was incurred and enforced—*Hagan v. Williams*, 2 La. 123; *McManus v. Jewett*, 9 La. 531; and to the same point is the later case of *Crear v. Soules*, 2 Ann. 598. In the case of *Stockton v. Bruce*, 1 Ann. 249, the attachment was based upon the neglect of registry; it failed, because the inscription of the last act was considered sufficient; and the dissenting opinion, is an argument upon the tenor and policy of the laws passed to enforce the prompt registry of acts. The penalty for neglecting to register a conveyance, is fixed by an express enactment. The penalty may always be avoided, by compliance with the requisitions of the law. If a purchaser neglect to inscribe his title, he exposes himself to loss by his own fault or want of diligence. From motives of public policy, the risk of other rights being acquired is thrown upon the party in default. A purchaser who omits to comply with the law, can receive no favor from the courts. Whether those who oppose are creditors or subsequent purchasers, he has no right to complain. The provisions of the law may seem to be harsh, but his own diligence would have avoided its penalty. If he loses, it is by his own neglect.

But these considerations are wholly inapplicable to the creditors of a fraudulent vendor. They have done nothing which the law prohibits; they have omitted nothing which it commands. How then can the force of a registry law be opposed to them, when they complain of a fraud? The mere registry of a fraudulent title, would certainly not prevent a revocatory action. To give to the registry laws such effect, would be a perversion of their meaning. They are intended only to compel inscription; not to regulate equities between creditors, or to fix the consequences of fraud. If the conveyance be made in good faith, the registry is the perfection of the title; if made in fraud, other laws prescribe when, how, and by whom, it may be annulled. A case reported in Sirey, 1807, 877, affords the strongest illustration of this principle. By the laws of France, a tax was imposed upon all sales, in proportion to the price. In order to enforce this law, registry was required, with a statement of the price actually paid. It was further provided, that, if the parties attempted to avoid this impost, by counter letters, stipulating for a higher price than that stated in the public act, the counter letter was absolutely null. In a case arising under this law, the price mentioned in the act was 250,000 francs, while the true price, as represented by a counter letter, was 300,000 francs. The counter letter was null between the parties, yet the creditors of the vendor recovered the remaining 50,000 francs from the purchaser. The law declared the contract absolutely null, but the courts could not give it a construction which would enable the purchaser to retain part of the price justly belonging to the creditors. In the hands of the vendor, the agreement was null and reprobated, because he was guilty of a violation of the law; but his creditors were innocent, and the penalty intended for him, could not be inflicted on them. "Que c'est donc," says the court, "faire une fausse application de ces lois ou il s'agit de l'intérêt de tierces personnes, de légitimes créanciers, qu'on a trompés à leur insu, par la contre-lettre dont il s'agit, dans laquelle ils ne sont point parties, et que le vendeur, d'intelligence avec les acquéreurs, a voulu priver d'une partie de leur gage; que ce serait autoriser le dol contre les créanciers, et les rendre victimes de la simulation ou de la fraude qu'ils n'ont pu empêcher, si on annulait à leur égard le titre qui la constate; ordonne," &c. 10 Dalloz, Jur. Gen. 675. Here the law pronounced absolutely null an agreement not contained in the public act; but the nullity was enforced only between the parties in fraud. Innocent creditors did not receive the stripes intended for fraudulent vendors. To follow the letter of the law would have been to annul its spirit. We repeat, therefore, that registry laws are intended to enforce diligence and to prevent frauds—not to favor them. No man can suffer by those laws who complies with their requirements. If a purchaser loses, he has only himself to blame. He may refuse to pay until his deed is inscribed, or he may inscribe it himself as soon as signed. But the law of registry cannot punish the creditors of the vendor, because it imposes no diligence upon them. Their rights are governed by rules and principles wholly distinct from those fixing the consequences of non-inscription. The proposition, that a title not registered has no effect against third persons, or creditors, does not embrace the proposition that a fraudulent title, if registered, will prevail against the creditors of the vendor.

III. What effect has art. 2236, as to counter letters, upon the issue now before the court? That article provides that counter letters can have no effect against creditors or *bona fide*

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purchasers; but that they are valid as to all others. The article is applicable only to counter letters, bearing witness of a legal contract. If the object be illegal, the counter letter is void, and cannot be enforced between the parties. Act, 1887. On the other hand, the agreement being illegal, creditors may set it aside; they may use the counter letter as proof of the fraud; they may hold the vendee to its terms, although the vendor could not do it. The rule is reversed by the fraud. The parties cannot enforce the contract, but third persons can. The article is intended for cases where property is voluntarily, but innocently, conveyed. In such cases the vendor has his recourse against the vendee, but takes the risk of all other persons acquiring rights. If he has imprudently invested another with the insignia of ownership of his property, the law imposes upon him all the consequences of his imprudence. The creditors of the vendee, either precedent or subsequent, may seize it, and the real owner cannot complain. He is estopped by his own act, and is not permitted to set up his private counter letter, against the public title which he has himself conferred. It follows that this article is not applicable to cases of fraud.

That this is true, will, we think, be proved by reference to the decisions and treatises upon the corresponding article of the Code Napoléon, art. 1321—notes. Sirey, C. de Annoté; 13 Durranton, n. 104; 8 Toullier, 186; S. & Villeneuve, 1842, 167; Dalloz, 1826, 1st part, 266; 10 Dalloz, Jur. Gen. 674. The principles established by these authorities, are uniformly discussed and decided, with reference to the effects of counter letters between the parties themselves, or between the parties and creditors. The party to the counter letter is always plaintiff or defendant. No case occurs of a conflict between the two classes of creditors, to wit, the creditors of the vendor and those of the vendee. The expression of the French article is, "*les tiers*," a term if possible more broad than that of the corresponding article of our Code, yet this article does not seem to have been applied to any case like the present. From one of the cases above cited, we may fairly presume that, if the position of the parties had been the same as in the present case, the counter letter would have been enforced.

IV. The articles of the Code giving to creditors their action to annul contracts of their debtors in fraud, apply to this case. We have endeavored to show that, no special law, relating to counter letters and registry, imposes upon the court the duty of inflicting a wrong upon the opponents; we have now to show, that the positive legislation of the Code, so far from commanding injustice, is entirely consistent with those principles of equity, for which we are contending, and which have been so repeatedly announced by chancellors and judges, in England and the United States. We think the case is fully covered by those articles of the Code, regulating the right of creditors to set aside contracts, in fraud of their rights. In the first place, the general principle is borrowed from the civil law, and consecrated by justice as well as by its age. "Every act done by a debtor, with the intent of depriving his creditor of eventual right he has upon the property of such debtor, is illegal, and ought, as respects such creditor, to be avoided." C. C. 1964, 1984, Dig. lib. 42, tit. 8, s. 1. 17 Poth. Pand. 406. 1 Domat, p. 495, lib. 2, tit. 10, s. 1. This general provision is equivalent to the provisions of the stats. of 13th and 27th Elizabeth, which have formed the basis of the English jurisprudence on the subject. But the Code has extended the principle still further, and prescribed its application to special cases, thus giving to the injured creditor more complete and definite relief, than he could obtain in a court of chancery. For instance, the court of chancery will not inquire into the adequacy of the price, unless it be so small as to be palpably fraudulent (3 Hovenden, 74), while the Code gives to the creditor the right of redeeming the property, even from an innocent purchaser, if the value exceed the price actually paid by one-fifth. Art. 1976. The English law does not prohibit a conveyance in payment of a just debt, while the Code declares that the insolvency of the debtor renders such a transfer fraudulent and void, and gives to the creditors the right of rescinding it, thus taking back the property for the mass, and reviving the debt paid by its transfer. Arts. 1977, 1978. The Code provides specially for cases in which the purchaser is innocent, and for those in which he is guilty of fraud, actual or constructive. In some cases restitution of price is made, with or without interest; in all, the property is recovered; and in all cases where the only consideration is a debt due, the only restitution made is, the replacing of the parties in the position in which they were before the transfer.

We presume that the plaintiff in this case, does not consider his attachment superior to the claim of a purchaser for a valuable consideration. If a purchaser for an inadequate price, he would be bound to give up the property, on the price being refunded. But he has paid no price; consequently we are compelled to place him a step lower in the scale. His position is nearest that of a creditor, who has obtained property in payment or as security. It is true that he does not obtain it from *Hall*, nor is *Hall* his debtor. But if the property, though in *Craddick's* name, really belongs to *Hall*, it is impossible to place a transfer to a creditor of *Craddick*, upon a better footing than a similar transfer to a creditor of *Hall*. That there are two fraudulent debtors, and two sets of creditors, cannot alter the principle, or prevent its application. The transfer to *Craddick* has been annulled. So far as he is concerned, his title is blotted out of existence. Then *Stockton* has acquired a lien on *Hall's* property, for the debt of another person. The basis of that lien, is a fraud upon the creditors of *Hall*. The rule laid down in the Code applies. The security thus acquired is annulled; there is no restitution, save replacing *Stockton* in his original position. He remains a creditor of *Craddick* as before his attachment.

Nor can it be pretended, that these provisions are inapplicable to attachment by legal process. The relief contemplated by the Code, is not confined to the case of contracts alone. Every act of the debtor in fraud, may be set aside or remanded. Arts. 1864, 1884. The act or contract with all its effects, is annulled. Arts. 1972. The levy of the attachment, was one of the consequences or effects of the fraudulent transfer.

The law is not confined to the cases specially enumerated in the Code. The cases stated are merely instances; the principles are embodied in the law.

If *Stockton* had taken a mortgage from *Craddick* for an old debt, his mortgage would be annulled. If he had bought the property for half its value, the property would be restored on refunding his advance; consequently he is to be put where he stood before. His attachment must be set aside, his notes go back to him. The only additional restitution that he could

possibly claim, would be his costs, until notice of the fraud. If more were allowed him, he would be more favored than an innocent purchaser, for he would receive more than he gave.

If we have not entirely failed in our argument, there is no special law, necessarily protecting this attachment against the just demands of the creditors of the true owner. The law of counter letters and of registry, being inapplicable, no other can be suggested leading to such a result. If the rules of the revocatory action do not apply, the conclusion must be, that in our most elaborate and highly artificial Code, there is no provision for a case of great importance and of frequent occurrence. Upon either hypothesis, this attachment must fail. If the Code does not provide for the case, we are thrown back upon those principles of justice and morality, which lie at the basis of all jurisprudence. Such principles are sufficient for the cause. No man can claim under a fraud, unless he has innocently advanced his money on the faith of the apparent title. If he has paid nothing, he can lose nothing by the fraud being redressed. If two parties are equally meritorious and equally innocent, the possession of one will not be disturbed for the profit of the other; but to say that they are equally meritorious, means that both have advanced their money, or that both are exposed to loss. The term does not apply when one only is exposed to loss, and the other has but the chance of gain. 1 Story, Eq. sec. 381. *Fletcher v. Peck*, 6 Cranch, 133. *Bean v. Smith*, 2 Mason, 272. 2 Vesey, Jun 458. 8 Mart. N. S. 342. 1 Mart. N. S. 387. *Walwyn v. Lee*, 9 Vesey, Jr. 24. 2 Fonblanque, Eq. b. 2, s. 2. 2 Hovenden, on Fraud, c. 18, p. 74.

V. The case has been thus far considered upon the supposition, that *Stockton* the attaching creditor, was not notified of the fraud. But we must again urge upon the court, that the circumstances were sufficient to put him upon enquiry, and he is therefore in law affected with notice of the fraud. The disproportion between the condition of the purchaser and the pretended price, was sufficient evidence of fraud and simulation. Can it be contended that the plaintiff, who knew this condition, and who saw the record of the purchase, was not put upon his guard? 2 Vesey, Jun. 437. 1 Story's Equity, s. 399. If *Stockton* had purchased from *Craddick*, knowing his position as he confesses he knew it, he could not have been considered an innocent purchaser. When defrauded creditors are seeking restitution, even purchasers receive no favor, if they were put upon enquiry and did not choose to enquire. They may not shut their eyes and be accounted innocent, because they were willfully blind.

It "is notice of the use, therefore, that is all the effect of the matter; for then he is *particeps criminis, et dolus et fraus nemini patrocinantur*, since in conscience he purchased my lands or my goods. For the common law, whenever it found a consideration discharged the covin; but chancery looks further to the corrupt conscience of the party, that will traffic for what in equity he knows to belong to another. And in all cases where the purchaser cannot make out a title, but by a deed which leads him to another fact, the purchaser shall not be a purchaser, without notice of that fact, but shall be presumed cognizant thereof; for it was *crassa negligentia*, that he sought not after it, and this is in law a notice." 2 Fonblanque, p. 151, b. 2, s. 2. *Re-hearing refused.*

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Under the common law, the title of the owner of personal property cannot be lost without his free consent.

No authority from the real owner to sell personal property is implied, by the common law, from the naked possession of the property by a third person, without the consent of the owner, under circumstances which ought to have put a purchaser from the latter on enquiry as to the origin of his possession and his title.

A sale of derelict or wrecked property, made under a statute, will not be valid unless there has been a substantial compliance with its requisitions.

Where one who had been authorized by a justice of the peace, under the provisions of the stat. of Arkansas of the 21st of February, 1838, s. 9, relative to the reshipment and sale of wrecked property, to ship such property to any market where he might deem it most likely that a good sale could be made of it, sells the property, by private sale, after its shipment, to the clerk of the steamer on which it was shipped, the sale will be without effect. *Per Curiam*: No application was made for permission to sell on the spot. Had such a sale been authorized, the sale would have been required to be public, after due notice, and at auction, to the highest bidder.

Where wrecked property is in safety, the salvor cannot sell it. A case of necessity may exist in which the power of the salvor to sell may be recognized; but, short of such a case, the salvor has no more authority to sell than a captor has.

A depositor who sells the deposit commits a theft.

If there be any thing unusual or irregular in a sale of property made by a party in possession but without authority to sell, the title of the real owner will not be affected by it, any more than it would be if the purchaser were not in good faith.

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A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. C. A. Jones and Maybin*, for the appellants. *Lacy*, for the defendant. The judgment of the court (*King, J. absent*,) was pronounced by

EUSTIS, C. J. This is an action brought by the plaintiffs, who were consignees of a quantity of lard, which was shipped to them in New Orleans from Terrehaute, in Indiana, on board the flat-boat *Thomas White*, for the recovery of a portion of it, which was found in the possession of the defendant in this city, and seized under a writ of sequestration. The parties in interest are the insurers on the cargo. It is alleged for the defence that, *Ball* purchased the lard in the State of Arkansas in good faith, and paid for it; and, on that ground, the district judge decided in favor of the defendant, and the plaintiffs have appealed.

It appears that the flat-boat was wrecked on her voyage on the Arkansas side of the Mississippi and was abandoned by the officers and crew, and that the cargo was taken possession of and sold to the defendant under color of certain statutes of the State of Arkansas. The validity of these proceedings were not enquired into by the District Court, whose decision was based on the *bona fides* of the purchase of *Ball* exclusively.

It is impossible for us to reconcile this purchase by the defendant, who was the clerk and part owner of the steamer *Marengo*, on which the lard was at the time shipped, with our ideas of what constitutes a fair mercantile transaction. The condition of the article, the external appearance of the casks, the place where the shipment on board the *Marengo* was made, were circumstances which ought to have induced more caution, and have put any person familiar with the river business on enquiry as its origin and the title of the party who undertook to dispose of it.

The defendant charges in his answer that he purchased the property in dispute from *Geo. W. Underhill*, as agent of one *Peterson*, and that he paid for it by two drafts, one for \$700 on New Orleans, and another for \$1,800 on Memphis, both of which he alleges have been paid. The former, it appears, only was paid; the second, for \$1,800, was accepted under conditions, but there is no evidence of its having been paid. The lard was shipped on board the steamer from the plantation of *Bayless*, to which it had been hauled from the wrecked flat-boat, as the property of *James Peterson*, by order of the justice of the peace, and the sale was made, after the shipment, to the defendant, the clerk of the boat.

But it is not necessary to determine this case solely on the question of the *bona fides* of this purchase. It is sufficient, that *Ball* acquired no greater right than *Peterson*, his vendor, had. As the common law prevails in Arkansas, we take the authority of Kent as conclusive on this point. 2 Kent's Comm. 324. 1 Johnson's R. 478.

The title of the true owner cannot be lost without his own free act and consent. No authority could be implied from the naked possession of *Peterson*, under the circumstances, which was not with the consent of the owner, but the result of *force majeure*—the wreck of the boat, and by virtue of the statute of Arkansas, under which his doings in the premises are justified, and which it remains to consider.

But it is necessary to state the position of *Peterson*, who is an intervenor in this suit. He alleges that he became the owner of the property wrecked in consequence of having secured and saved it, and that he, through his agent *Underhill*, sold the property in dispute to *Ball*, for a valuable consideration, and that

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Ball is the *bond fide* owner of it. He bases his rights on his compliance with the statutes of Arkansas relating to wrecked property, under which he claims title, and prays for an allowance of \$3,500, for expenses, labor and risk in saving the property, in the event of its being adjudged to belong to the plaintiffs. The proceedings under which he acted are set forth in an instrument purporting to be a copy of a record of a justice's court of the State of Arkansas, to the admission of which in evidence the plaintiffs' counsel have taken a bill of exceptions.

The proceedings import that *Peterson*, as the salvor of the property, which he had succeeded in saving from the wreck of the flat-boat, applied for an order of the justice to ship it to any market which he might deem expedient for the purpose of effecting a good sale, on the ground of its being in a condition to become valueless if longer kept. The justice being satisfied that the requisitions of the statute had been complied with by *Peterson*, ordered that he be authorized to ship the lard to any market in which he might deem it most likely to effect a good sale. The lard was shipped, as we have stated, on board the steamer *Marengo*, and sold to *Ball*, the clerk of the boat, as we have before seen.

The authority under which *Peterson* justifies his acts, and undertakes to vest the property in *Ball* by a sale, gives him no power whatever to sell; on the contrary, it negatives any such power, as the statute under which the proceedings were had conclusively shows. He did not apply for permission to sell on the spot, but to ship to a market, where a sale could be more advantageously effected. Had he applied for authority to sell under the statute, its provisions would have been required to be complied with. The sale would have been public, after due notice by advertizement, and at auction to the highest bidder. This was not applied for. An authority to ship was asked for, and that alone was granted.

The statute of the State of Arkansas, concerning property lost or wrecked, contemplates the shipment of such articles as that in dispute in this case, to some market, for the purpose of preventing a sacrifice by a sale in an unfrequented and perhaps almost inaccessible spot, where the property is thrown, and where the temptation is so strong, because the opportunities are so great, for collusion among those present, to the detriment and injury of the absent owner; but where a sale is required to be made on account of the condition of the property, it gives the absent owner the protection of a fair public sale at auction, after such advertizement as the magistrate may direct.

The two sections of the statute which regulate the sale and shipment of property wrecked, are as follows: "Sec. 9. When a raft or boat with produce therein shall be taken up, which raft, or cargo of the boat, consists of such articles as are usually taken to the State of Mississippi or Louisiana, for sale, and the owner does not apply for, or make demand of, such property within twenty days, the person taking up such property may apply to some justice of the peace of the county, where such property was taken up; and, on showing that the property so taken up is of a perishable nature, and is likely to be injured, or become of less value, by being kept, such justice may make an order authorizing the taker of such property to sell such property at public auction, on giving notice by advertizement, as the justice may direct; or authorizing the taker up to ship such property to any market, where he may deem it most likely he will effect a good sale of such property."

Sec. 10. "Before such sale shall be made, or the property removed for shipment to another market, the taker up thereof shall enter into bond to the State of Arkansas, with sufficient security, to be approved of by the justice, in double the

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value of the property so taken up, conditioned that if the owner shall appear, and establish his claim to said property, within one year from the time of taking up such property, the taker up will pay to such owner the value of such property, deducting his salvage, or, when taken to a market, then deducting his salvage and reasonable expenses." Revised statutes of Arkansas, p. 719, ch. 84.

In the presence of the provisions of this act, we can recognize no power in *Peterson* to sell, under the authorization of the justice to ship the property to a market for the purpose of securing a fair price for the benefit of the owner. For the private sale by his agent, *Underhill*, the precept in evidence was no warrant; and, without adverting to any of the circumstances which mark this case as extraordinary, we cannot hold a sale of derelict or wrecked property to be valid under a statute, without a substantial compliance with its requisitions. The owner cannot be deprived of his property without his agency or consent, except by virtue of law. Nor can we consider *Ball* as without that notice, which the facts of this case, as disclosed in evidence, strongly imply. There was enough in the circumstances to put him on enquiry. He ought to have looked into the matter when he made the purchase, and cannot now urge his want of due diligence and circumspection. *Schooner Tilton*, 5 Mason, 494.

The statute of Arkansas, which was made for the protection of property wrecked, we think places the salvor in the relation of a quasi depositary. It gives him the possession adversely to third persons, but negatives the power to sell at private sale, by requiring the sale of wrecked property to be sold at public auction. When property wrecked is in good safety, we know of no authority on the part of salvors to sell it. A case of necessity, we are not prepared to say might not exist, in which the power of the salvor to sell might be recognized; but, short of such a case, the salvor has no more authority to sell than the captor has. The consequences of the contrary doctrine would be alarming to the interests of our internal trade. It would make the river coast, in times of tempest and disaster, the theatre of rapacity and plunder, and would defeat the conservative purpose of the statute itself. With a view to results like this, it has become a principle of the law of nations, that a naked sale of an enemy's property by a captor is void, and does not divest the owner's title, without a sentence of condemnation.

Without the statute, we can find no authority of *Peterson* to make the sale to *Ball*, still less in the manner and under the circumstances disclosed in the testimony. We have stated that it was not necessary to determine on the *bona fides* of *Ball*, in making the purchase. It is sufficient for the owner to establish that the title to the property was his. The sale under the statute cannot be maintained; the salvor had no right to make the sale. His possession as bailee gave him no right to sell, his powers being limited, on principles of law, to those of a keeper of an irregular deposit, custodian, or a guardian of things for hire. Story on Bailments, § 622. The depositary who sells the deposit, commits a theft of it. Et la chose devient infectée du vice de vol, qui ne se purge point, jusqu'à ce qu'elle soit rendu an propriétaire. Pothier, Traité de Depot, § 43. But if there be any thing unusual or irregular in the sale, the validity of the title of the real owner will not be affected by it, any more than it would be if the purchaser were not in good faith. Kent's Com. loc. cit. *Ball* may not have known who the owner of this lard was; but the time, the place, the condition of the casks, and the attendant circumstances, satisfy us that the sale was neither regular nor

usual, and that the purchase was a speculation out of the ordinary course of the river trade.

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On both grounds, we think the law is against him. We think an adherence to established principles on the part of courts is absolutely necessary in cases of this kind, in order to secure the safety of property in its way down to this mart, during the long and hazardous navigation from remote States, by discouraging the avidity and misconduct of those who are constituted by the laws the protectors of it, and the aid afforded them by adventurous and incautious speculators.

We do not feel ourselves authorized to allow *Peterson* the salvage which he claims in his petition of intervention. The bill of lading offered in evidence shows that there was on the boat other property of value, of which *Peterson* has given no account whatever, and which, on the evidence before us, must have been taken possession of by him. Under the circumstances an allowance of salvage on the property thus unlawfully converted by him to the injury of those interested, would be, under our views of the subject, in direct conflict with the reason and policy of the law. There were eighty-eight barrels of pork on board the boat, of which no account is given.

The judgment must be for the plaintiff, and against the intervenors.

It is therefore decreed that, the judgment of the District Court be reversed, and that the plaintiff recover from the defendant the property sequestered, to wit: one hundred and twenty-five barrels of lard, one hundred and eight tierces of lard or grease, and one hundred and nine kegs of lard, with costs in both courts; and that the intervention of *Peterson* be dismissed, with costs.

GALES v. CHRISTY, Assignee.

A judgment obtained against a natural tutrix, ascertaining the amount due by her to her minor children, is not evidence against the defendant in an action to enforce the tacit mortgage of the minors against their tutrix on property in the hands of an assignee of one, who acquired by purchase at a judicial sale of the effects of the community formerly existing between the mother and the father of the minors, made before the date of the judgment.

Art. 2428 C. C., which declares that property claimed in an action cannot be alienated, pending the action, to the prejudice of the plaintiff, does not apply to one who purchases real estate pending an action against the owner to recover a balance alleged to be due by him as tutor, the action being not for the land itself but for a sum of money. And one who claims to exercise a mortgage on the property for the debt so ascertained to be due to the minors, must produce other evidence than the judgment to establish the debt, the judgment being as to the purchaser *res inter alios*.

A sale under execution of "all the rights, claims, demands and interest which the heirs of A. have upon their mother and natural tutrix, on account of their inheritance from &c.," is void for vagueness and insufficiency in the description of the thing sold. The nature of the rights, interest, claims and demands should have been so stated as to give bidders a clue to their value. Art. 647 C. P. does not dispense with a proper description of the rights and credits seized.

As against himself and those he represents, a man's actions and representations will be presumed to correspond with the truth. They are in all cases evidence of the fact; and where a party has induced another to act on the faith of such representations, and where he cannot show the contrary without a breach of good faith and common honesty, such representations are usually absolutely conclusive.

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v.
CHRISTY.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. and W. D. Hennen*, for the appellants. *Micou, Lockett and Goold*, for the defendants. The judgment of the court (*King, J.* absent,) was pronounced by *Rost, J.* This is an action against a third possessor, to enforce the tacit mortgage of minors against their mother and natural tutrix, on property alienated by her pending the tutorship. The nature of the claim can best be explained by stating the origin of the alleged debt, and the chain of title under which the City Bank, the real defendant in interest, holds the property.

Thomas Beale, sr., died in 1819, having, before his death, conveyed his property to a natural son, who died about the same time. After the death of *Beale* and his son, *J. Wistar*, one of his creditors, brought suit against *Mrs. Beale*, as widow in community and tutrix of her minor children, in the United States Court. *Mrs. Beale* successfully defended herself from this claim, on the ground that it had been contracted before her marriage with the deceased, and did not constitute a debt of the community; but a judgment was obtained, in May, 1829, against her minor children for \$6705 80, besides interest. Under this judgment execution issued, and, after various proceedings, the rights and claims, demands and interest which the minors had against their mother and natural tutrix for and on account of their inheritance from their father, were advertized and sold by the marshal. The deed given by him to the purchaser is, after reciting the seizure, sale and receipt of the price, in these words: "Now, therefore know all men by these presents, that I the said marshal do, in consideration of premises and by virtue of the act in such case made and provided, grant, bargain, sell, assign and set over to the said *Alfred Hennen*, as trustee and agent for *Eliza H. Gales*, and to his heirs and assigns forever, all the aforesaid rights, claims, demands and interest, which the said heirs of *Thomas Beale, sr.*, had upon their mother and natural tutrix, *Mrs. Beale*, widow of *Thomas Beale, sr.*, deceased, as aforesaid, on the 29th day of May, 1829, or as at any time since, on account of their inheritance as aforesaid, to hold the same to the said *Alfred Hennen*, as trustee and agent for the said *Eliza H. Gales*, and to his heirs and assigns forever." This adjudication was made for \$300.

Soon afterwards, a suit was instituted in the United States court by the present plaintiff against *Mrs. Beale*, alleging, that the latter was indebted to her minor children, to the amount of \$20,000; that, by the marshal's sale for \$300, the petitioner had become subrogated to the rights of the minors; and claiming judgment accordingly. The case was tried in the absence of the defendant's counsel, and judgment recovered against her. She applied for and obtained a new trial, and, about eighteen months afterwards, in the year 1837, the cause was taken up again in the absence of her counsel, and judgment was rendered against her for \$8,252 50.

Pending those proceedings, the simulated sales made by *Beale, sr.*, to his natural son, had been set aside by decree of court, and the widow in community and children obtained possession of a plantation in the parish of Jefferson, and a few negroes. *Beale v. Delaney, et al.*, 6 Mart. N. S. 643.

An order of court was obtained in the parish of Jefferson, for the sale of the property recovered, and, at this sale, *D. F. Walden* became the purchaser, in 1831. The minor heirs subsequently brought suit against him for an undivided half of the property, on account of informalities in the proceedings, and recovered judgment. *Beale et al. v. Walden*, 11 Rob. 68. In 1839, *Walden* gave a mortgage to the City Bank, under which his remaining half interest was sold by the

sheriff, and the City Bank became the purchaser. The title of the City Bank is consequently derived from *Mrs. Beale*, and the plaintiff alleges that, while the property was in the hands of the said *Mrs. Beale*, it was affected by the tacit mortgage of her minor children to secure the debt due by her to them; that she is subrogated to their rights, and that the property in the hands of the bank remains liable to the mortgage.

The defence set up is: 1st. That the judgment of *Wistar* against the minor heirs is null: 2d. That the sale of their rights under execution was null: 3d. That the judgment obtained by the plaintiff against *Mrs. Beale* has no effect upon the property acquired by the City Bank from *Walden*: 4th. That *Mrs. Beale* was not indebted to her minor children: 5th. That if there ever existed such a mortgage upon this land, as by plaintiff alleged, it is extinguished by prescription: 6th. That the pretended proceedings by which a judgment was obtained against *Mrs. Beale*, were fraudulent and collusive. This defence was sustained by the District court, and the plaintiff appealed.

Under the facts of the case the judgment obtained by the plaintiff against *Mrs. Beale* was not evidence, as against the City Bank.

The plea that *Mrs. Beale* was not indebted to her children in any amount whatever, and that the judgment was obtained against her by fraud and collusion, involve negative propositions, which it was not in her power to prove conclusively. *Sorapuru v. Lacroix*, 1 La. 380. *Beard v. Bijeaux*, 8 Martin, N. S. 462. The subject matter of these negative averments being peculiarly within the knowledge of the plaintiff, those averments should perhaps be taken for true, unless disproved by her. But the defendants have gone further, and introduced evidence which affords ground for presuming that the first, at least, of those averments is true. 1 Greenleaf, Ev. nos. 78, 79.

It is urged, on behalf of the plaintiff, that *Walden* purchased the plantation during the pendency of her suit against *Mrs. Beale* in the United States Court, and that, under art. 2428 C. C. he has no greater rights than his vendor. The District court correctly held that the claim of the plaintiff in that suit, not being for the plantation but simply for a sum of money, the article of the Code relied on did not apply, and that *Walden* should be held in the light of a third person. It was therefore incumbent on the plaintiff, when claiming to exercise a mortgage on the property, to prove by other evidence the existence of her claim. This, we are of opinion, she has failed to do. The evidence in the record, on the contrary, raises a very strong presumption that no indebtedness existed, and that, if *Mrs. Beale* had been properly defended, judgment must have been rendered in her favor.

Being of opinion that the judgment in the suit of *Mrs. Gales v. Mrs. Beale* is not evidence in favor of the present plaintiff, the question then arises what effect is to be given to the judgment of *Wistar* and the proceedings under it, against the present defendants.

It is probably true, as alleged by the plaintiff's counsel, that the only questions that the defendants have the right to raise against that judgment are, want of jurisdiction in the federal court and fraud in the parties; and we agree with him that the first is untenable, and the second not proved.

It was not necessary, under the rules of practice in force at that time in the courts of the United States, to appraise moveables or credits, taken under execution. But we are of opinion that the judicial sale to the plaintiff of the rights, interests, claims and demands of the heirs of *Thomas Beale, sr.*, in right of their inheritance of their deceased father, on their mother and tutrix, is void, by reason

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of the vagueness and insufficiency of the description of the thing sold. The nature of the rights, interests, claims and demands should have been stated in such a manner, as to give bidders a clue to their value. Art. 647 C. P. authorizing the seizure of the rights and credits of the debtor when he has neither moveable nor immovable property nor slaves, does not dispense with a proper description of the rights and credits seized. The seizure and sale made in this case were illegal and void. *McDonough v. Gravier's curator*, 9 La. 542.

The record furnishes satisfactory evidence that, the counsel and agent of the plaintiff considered and treated the sale as a nullity. That agent was, from the beginning, the counsel of *Wistar* in his suit against the heirs of *Beale*. On the very next day after the marshal's deed was made to him for the plaintiff, a *pluries* writ of *fi. fa.* was issued in the suit of *Wistar* against the heirs of *Beale* for the entire amount of the judgment, without any credit whatever, for the proceeds of the former sale. This writ was returned unsatisfied, and some time after another was issued for the full amount of the judgment. The return on this writ shows that the land was seized and several times sold by the sheriff, that the purchasers all failed to comply with the terms of the sale, and that finally the entire amount of the judgment was paid, and the writ returned satisfied.

These proceedings were had under the direction and supervision of the plaintiff's agent, and his knowledge must be held to have affected her with notice. The legal presumption from his conduct operates in the nature of an admission that the first sale was a nullity, and that the price had never been paid; "for as against himself and those he represents, it is to be presumed that a man's actions and representations correspond with the truth. These are in all cases evidence of the fact; and where the party has induced another to act on the faith of such representations, and where he cannot show the contrary, without being guilty of a breach of good faith and common honesty, such representations are usually not barely evidence of the fact, but are absolutely conclusive." *Starkie*, vol. 3, no. 1253. 1 *Greenleaf*, no. 27.

The record of the suit of the heirs of *Beale v. Walden*, shows also that *Beale's* heirs have treated the alienation of their rights of inheritance as a nullity, to the knowledge of the plaintiff's agent, and without opposition from him.

Judgment affirmed.

OSBORN v. CHAMBERS.

It is not necessary to serve on the defendant copies of acts or documents annexed to the petition, though the petition itself states that they form part of it. C. P. 175.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Van Matre*, for the plaintiff. *Randall*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

ROSE, J. This action was brought on an open account, for work done and materials furnished by the plaintiff to the defendant. The defendant having failed to appear, a judgment was taken against him by default; and, after the legal delays, the plaintiff proved his claim, and the judgment was made final. The defendant then appeared in court by counsel, and moved for a new trial, on the ground that the account annexed to the petition was alleged to be made part

thereof, and that he had not been served with a copy of said account. The motion was overruled, and the defendant appealed.

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It is not necessary to serve on the defendant copies of the acts or documents annexed to the petition, and the fact that the petition mentions that they form part of it does not vary this rule of practice. C. P. 175. The claim of the plaintiff is satisfactorily proved, and the judgment must be affirmed.

Judgment affirmed.

WALKER v. CALDWELL.

The stat. of 16 March, 1848, ch. 191, purporting to amend the stat. of 4 May, 1847, by reference to its title only, and its provisions being necessarily inoperative without a reference to the stat. of 1847, the first section must be considered as in direct conflict with arts. 118, 119 of the constitution, and any appointment made under it as void.

4	297
40	1537
4	297
51	1218
51	1219
51	1223
4	297
109	599

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. W. W. King*, for the appellant, contended that the act of 1848 does not revive or amend that of 1847; but provides for the appointment of an officer after the term of office under the first act had expired. The stat. of 1848 is within the concluding clause of art. 120 of the constitution. *Larue*, for the defendant. The judgment of the court (*King, J. absent*,) was pronounced by

EUSTIS, C. J. This suit was originally instituted by *Alexander Walker*, liquidator of the Atchafalaya Railroad and Banking Company, against the defendant, who was a stockholder of said company, to recover the sum of \$600, being the amount of certain instalments which, it was alleged, was due by the defendant on his stock. The office of liquidator having expired under the law of 1847, *M. M. Reynolds* was appointed to succeed *Walker*, under the act of 1848, amending that of 1847, and, having resigned the office pending this suit, the present plaintiff, *Theodore O. Stark*, was appointed in his place. On *Reynolds'* becoming a party to the suit an exception was taken to the validity of his appointment, on the ground of the unconstitutionality of the act of 1848, under which he was appointed, and the District court sustained the exception. The same exception was taken to the appointment of *Stark* with the same result, and, the suit having been dismissed, the plaintiff has appealed.

Walker was appointed under an act entitled "An act to provide for the liquidation of the affairs and payment of the debts of insolvent corporations," approved on the 4th of May, 1847, and his term of service of one year, to which the duration of his appointment was limited by said act, had expired. His successor was appointed under an act approved the 16th March, 1848, entitled "An act to amend the act entitled, an act to provide for the liquidation of the affairs and payments of the debts of insolvent corporations, approved the 4th of May, 1847." The first section provides that, after the expiration of the term of office of the liquidators appointed under the act of 1847, the governor shall appoint the liquidators, who shall continue in office until the affairs of the respective insolvent corporations shall be liquidated and settled, provided the term shall not exceed two years; and the liquidators shall give bond and security, and conform to the provisions of the act hereby amended.

Article 119 of the constitution provides that no law shall be revived or amended

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by reference to its title, but in such case the act revived or section amended *shall* be re-enacted and published at length.

The act of 1848 purports expressly to amend the act of 1847, by reference to its title, and, without reference to the act of 1847, its provisions would be inoperative. It purports to do that which the constitution declares shall not be done, and the act must yield to the operation of the constitution, or the articles of that instrument providing for the forms of legislation be held to be of no effect. Those forms have been placed under the guarantee of the constitution, as a safeguard against errors and abuses in the legislative power. It has become the fundamental law of the State, that every law enacted by the legislature shall embrace but one object, and that that object shall be expressed in the title of the law; that the legislature shall never adopt any system or code of laws by general reference, but in all cases shall specify the several provisions of the laws it enacts; and that no law shall be amended or revived by reference to its title.

The condition of our statute law was such, at the time of the formation of the constitution, as to impose on the convention the necessity of providing in the constitution itself for the forms of legislation.

The title of an act often afforded no clue to its contents; important general provisions were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes in the same statute with matters entirely foreign to them; the result of which was, that, on many important subjects, the statute law had become almost unintelligible, as they whose duty it has been to examine, or to act under, it, can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provisions under consideration. The legislature having provided for a revision of the former statutes, if those provisions are observed by future legislatures, this body of our law will be preserved in an intelligible form; otherwise, the confusion which prevails will be continued and increased.

The argument of the counsel for the plaintiff is, that the act of 1848 is constitutional, because it provides for the appointment of the officer after the term under the former act had expired, and therefore did not revive or amend that act in the intendment of the constitution. Notwithstanding this formal provision in the act of 1848, the objections to its form still remain. The object of the law is not stated in the title, except by reference to the title of the act it purports to amend.

The object and purpose of the constitutional provision being evident and unquestionable, and its language free from ambiguity, the duty is imposed on the judiciary of giving it effect.

Considering, therefore, that the first section of the act of the 16th of March, 1848, is in direct conflict with the 118th and 119th arts. of the constitution, the appointment of the plaintiff under it as liquidator of the Atchafalaya Railroad and Banking Company, confers on him no capacity to maintain the present action against the defendant.

Judgment affirmed.

MONTGOMERY et al. v. WOOD et al.

A party to whom goods were shipped with directions to sell them for cash, delivered the goods to a purchaser at a cash sale; but, in compliance with a custom of the place, as to

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such sales, to deliver goods and call for the price three or four days after, did not require payment at the time of delivery, but called in the evening of the day of the sale, and for several successive days, without obtaining payment. The agent suffered several weeks to elapse without making any attempt to secure the price, though he must have suspected that the debtor was in failing circumstances, and might have recovered the goods or secured the price. There was no proof that such an attempt would have been fruitless. In an action by the shipper to recover the price of the goods: *Held*, that defendant was responsible for the price, having failed to show due diligence to collect the debt.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Halsey and Britton*, for the appellants. *Bradford*, for the defendants, cited 11 Mart. 636. 1 Pick. 342. Dunlap's Paley on Agency, 26, 27, and cases cited. The judgment of the court (*King, J. absent*,) was pronounced by

ROST, J. This action is brought to recover the proceeds of a sale of goods, sold on plaintiffs' account by the defendants, who are commission merchants. It is alleged in the petition, and admitted in the answer, that the goods were shipped to the defendants, to sell them for cash and remit the proceeds.

The defendants received the goods and sold them to *Bernard Donlin*, a person alleged to have been in fair credit at the time, and delivered them, without receiving or demanding the money. Six or seven weeks after the delivery, *Donlin* failed and absconded, leaving the debt unpaid; and the defendants, who are now sued for the amount, deny their liability, on the ground that the sale was made for cash, in pursuance of instructions, without guarantee on their part, and in the usual course of trade, to a person in fair credit at the time. They further allege that they acted with due caution and prudence, and, after the sale, used all due diligence to collect the price from *Donlin*, but without success. On this issue there was judgment in favor of the defendants, and the plaintiffs have appealed.

In support of the ground assumed by the defendants that they sold in the usual course of trade, they have introduced several witnesses, who testify that it is the universal usage in this city, in sales for cash, to deliver the goods, and to call for the money two, or three, or four days, or more after the delivery. Those witnesses also testify that when a merchant in this city sells for cash without charging the guarantee commission, he is not considered liable for the sale.

Supposing this usage to be binding upon the plaintiffs, we are still of opinion that the defendants have failed to show due diligence in their attempts to collect the debt. *Ludwigsen*, the former clerk of *Wood & Simmons*, testifies that he made the bill of the goods sold to *Donlin*, and wrote thereon the word cash. He took the bill to him in the afternoon of the day on which the sale was made, and called again the next day, or the day after, for the money. *Donlin* put him off for two or three days; witness called again on the day appointed, and was told to call the next day. Witness called the next day and on several successive days, and was again put off. *Donlin* did not deny that he had bought the goods for cash, but said he was rather short of money, and would pay it in a few days. The money was never collected, and more than six weeks after the delivery of the goods *Donlin* failed, and absconded.

The conduct of *Donlin*, when first called upon by the defendants' clerk, was such as should have put them upon enquiry as to his circumstances. Had they made diligent enquiry, they would have ascertained that, before he absconded, two of the sheriffs of New Orleans had writs against him, and were executing them, and by prompt action they might have recovered the goods or secured the price. They suffered several weeks to elapse without making any attempt to secure the claim, when they should have known, and must have suspected, that

MONTGOMERY *Donlin* was in failing circumstances; and they have adduced no evidence to prove
 v. that any such attempt on their part would have been fruitless.
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In the case cited by the defendants (1 Pick. 342), the circumstances were much less calculated to alarm the agent than those presented here. It is also worthy of remark that the court there considered that, to retake possession of the goods would have had the effect of cancelling the sale, and thus the principals might have suffered by a falling market; and it was thought to be a proper subject for the agent's discretion, under the circumstances, whether he would take that risk. But, under our law, which confers the vendor's privilege, the seller may have the benefit of seizing the goods by judicial process and applying them to his debt, without rescinding the contract, but still holding the vendor personally bound for the price.

The plaintiffs are entitled to a judgment. It is therefore ordered that the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs, and against the defendant *Lorenzo D. C. Woods*, who has alone been cited, for the sum of three hundred and seventeen dollars and fifty cents, with legal interest from the 23d May, 1846, till paid, and costs in both courts.

LIVAUDAIS v. DENIS, Executor.

Where obligations have been placed in the hands of an agent to collect, it is not sufficient for him, after some time has elapsed, to offer to return them, without showing that he exercised ordinary care and industry to obtain payment.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Le Gardeur*, for the appellant. *Denis, pro se. J. and H. H. Strawbridge*, on the same side. The judgment of the court (*King, J. absent*;) was pronounced by

SLIDELL, J. *St. Avid* was, during several years, the agent at New Orleans of the plaintiff, who was living abroad. This suit was brought to recover an alleged balance due from the agent, and, by the admissions of the parties at the trial, the contest was narrowed down to certain specific items. *St. Avid* had received, in 1842, from the former agent of plaintiff, various assets belonging to the plaintiff, among which were a note of *Charpentier* for \$1,050 91, maturing a few days after its receipt by *St. Avid*, and also a protested note of *Roussel & Vienne*, on which it was stated in the receipt that two dividends had been paid.

Charpentier, a witness for the plaintiff, to whose testimony no exception was taken, deposed that he had paid the amount of the note to *St. Avid* in two payments, one of \$500 and the other of \$550 91; and that he was unable to produce the note, having burned it after taking it up.

It appears that *St. Avid* has given credit in account for the first payment, but not for the second; and it is objected that the testimony of one witness is not sufficient, under article 2257, to charge him with a liability for a sum exceeding \$500. If the article can be deemed applicable, the objection is answered by the consideration that the claim does not rest upon the testimony of a single witness, but is supported by corroborating circumstances. *St. Avid* had given a written acknowledgment of the receipt of this note for collection, as plaintiff's agent. If *Charpentier* had not paid it, it would have been in *St. Avid's* possession, or in

that of his executor after his death, and should have been produced. The agent's receipt, and the non-production of the note, are strongly corroborative of the truth of *Charpentier's* testimony.

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DENIS.

It appears that *Roussel* was an insolvent, and his estate was administered by a syndic, who had paid the plaintiff's former agent two dividends. A dividend was declared in 1843, being after the commencement of *St. Avid's* agency. An agent of one of the creditors of *Roussel* states, that he collected the dividend for his principal, in October, 1843. The district judge decided that the defendant could not be held liable for the amount of the dividend, because *St. Avid* had not received it, and there was no proof that he had knowledge of its existence. One of two propositions is clear. Either *St. Avid* knew the declaration of the dividend and neglected to collect it; or else he neglected to make due enquiry from time to time, and his ignorance must be attributed to his own fault. He knew that the insolvent estate was under administration, and that dividends had been already made; and it was his duty to use reasonable diligence, from time to time, by calling upon the syndic. If this had been done, it is fair to suppose he would have been equally successful with the other agent. It has been repeatedly held that, when obligations are placed in the hands of an agent for collection, it is not sufficient for him, after a lapse of time, to offer to return them, without showing that he exercised ordinary care and industry to get the money. *Police Jury v. Bullitt*, 8 Mart. N. S. 328. *Collins v. Andrews*, 6 Mart. N. S. 195.

The amount of the obligation entrusted for collection is, *prima facie*, the measure of damages sustained by the principal.

It is, therefore, decreed that the judgment be amended by increasing the capital sum adjudged, so that the same be fixed at the sum of \$2,317 77, instead of the sum of \$2,057 38; and that, so amended, the judgment be affirmed; the costs of appeal to be paid by the defendant.

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ZERINGUE v. WHITE.

Where an act of sale refers to a plan as containing a drawing of the land, and the purchaser has possessed in conformity with it, he will be estopped from claiming other boundaries on the allegation that the lines as represented on the plan are not in accordance with the original grant.

Witnesses cannot be examined as to matters of law, which it is the exclusive province of the court to determine.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. L. Janin*, for the plaintiff, appellant. *Benjamin and Micou*, for the defendant. The judgment of the court (*King, J. absent*.) was pronounced by

ROST, J. The only question presented by this case is, as to the proper location of a spanish grant, under which the plaintiff claims. The requête expresses the desire of the grantee to establish himself upon a tract of land called "*el Encinal Grande* (*Grande Chênrière*), which forms a sort of island between two lakes, and runs in a direction down the river, distant therefrom about one league, and is cut across by a bayou called bayou of the Little Lake. The requête prays for a grant of sixty arpents in depth on each side of said bayou, with all the front thereon, which may be about eight arpents." The ridge of the *Grande Chênrière* runs

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in a straight direction for about fifty arpents from the bayou of the Little Lake, at which distance it diverges towards the river, following the sinuosities of another bayou.

The plaintiff contends that, under the calls of the requête, he is entitled to claim all the ridge of high land known as la Grande Chênière, to the extent of sixty arpents from the bayou of the Little Lake. The defendant on the other hand, insists that the plaintiff is bound to protract his side lines straight from the bayou of the Little Lake to the entire depth called for by his title, and should not be allowed to alter the directions of those lines in order to suit the change of direction of the ridge of highland.

It is perceived that the controversy involves the right of the parties to the ridge of the Grande Chênière beyond the depth of fifty arpents from the bayou of the Little Lake. It is admitted that this portion of land is included within the title of the defendant, which is posterior in date to that of the plaintiff.

It is in evidence that, in 1806, the grantee under whom the plaintiff claims, and his wife, to whom he had transferred his rights, caused a survey of his grant to be made by *Barthélemy Lafon*, and that, on this plan, the side lines are protracted without deflection from the bayou of the Little Lake to the depth of sixty arpents. This survey appears to have been made in presence of the adjoining proprietors, and has ever since been recognized by the grantee and his wife, and referred to by them in the subsequent sales they have made. *Guinault*, the immediate vendor of the plaintiff, had acquired with reference to it, and, in his sale to the plaintiff, it is stated, "*que les dites portions de terre sont figurées sur un plan ensuite duquel se trouve un procès-verbal d'arpentage relatif à la totalité de la terre susdite, dressé le 19 Avril, 1806, par feu Barthélemy Lafon alors arpenteur, député par Isaac Briggs, arpenteur général du Territoire sud du Tennessee, et dont une copie est annexée à l'acte de ses vendeurs.*" This act bears date in 1842.

No actual possession of the land in controversy by the plaintiff being proved, the District court was of opinion that the plaintiff was bound by the interpretation put upon the grant by the original grantee and those claiming under him. We concur in this view of the law, and are of opinion that the plaintiff is estopped, by the very sale under which he holds, from alleging that the direction of the side lines, as they are represented in *Lafon's* survey, are not in accordance with the original grant.

On the trial of the cause, the plaintiff offered practical surveyors to prove: 1st. How the concession under which he claims was to be laid down upon the ground. 2d. Whether the calls in that concession were so definite that a competent surveyor could not fail to lay it down correctly. 3d. Whether it is laid down correctly in the plan made by *Phelps*; and, if not, how it should be laid down. The court, on the defendant's objection, refused to allow those questions to be put, considering that they were matters of law to be determined by the court on the title papers in evidence. The plaintiff took a bill of exceptions.

The District court did not err, in refusing to permit those questions to be answered by the witnesses. The answers would have decided the controversy, which the court alone had power to determine. *Bowman v. Flower*, 7 La. 111.

Judgment affirmed.

JONES v. ELLIOTT.

The transfer of the title to a promissory note is not restricted to the form of an endorsement.

It may be assigned by a separate instrument; and the assignee may sue in his own name. Where a note described in a notarial act of assignment corresponds in date, amount, parties, rate of interest, maturity, and in all other respects with the note sued on, with the single exception that the note described in the notarial act is stated therein to be secured by mortgage while the note held by plaintiff is not *paraphed*, the want of a paraph will not be considered inconsistent with the identity of the notes.

Article 3347 C. C. which directs that "every notary before whom an act shall have been made, by which notes to order have been given for the payment of a debt bearing a privilege or mortgage, shall attest each of the notes by putting his name on them, mentioning the date of the act from which the privilege or mortgage is derived, under the penalty of damages," is merely directory to the notary. The *paraph* is not essential to the existence of the mortgage; the identity of the note may be established by evidence *aliunde*. The correspondence of date, amount, parties, rate of interest, and maturity, coupled with the possession of the note, raises a presumption of identity, throwing upon the defendant the burden of showing the existence of another note of like description made by himself, the mortgagor referred to in the act of assignment.

A PPEAL from the District Court of Jefferson, *Clarke, J. Michel*, for the appellant. *F. B. Conrad*, for the defendant. The judgment of the court (*King, J. absent*.) was pronounced by

SLIDELL, J. There is perhaps some looseness in the clerk's certificate of the transcript, but it is aided by the statement of facts made at the trial; and we see no reason to doubt that the transcript presents all the evidence upon which the cause was tried.

Phelps is the payee of the note, upon which this suit is brought against *Elliott*, the maker. The transfer of the title to a promissory note is not restricted to the form of an endorsement merely. It may be assigned by an independent instrument. In a court of common law the mere assignee of a negotiable instrument, not endorsed by the payee, would not be permitted to sue in his own name; but a court of equity would aid the assignee in its collection, and certainly there is no objection under our system to the assignee suing in his own name. See *Hughes v. Harrison*, 2 La. 92.

The defendant has not shown any equitable defence, which could have been maintained against the payee, were he plaintiff in the cause.

The district judge was not satisfied with the evidence adduced to show the ownership of the note. In this opinion we do not concur. The plaintiff relies upon a notarial act of assignment of a promissory note which corresponds, as therein described, in date, amount, parties, rate of interest, maturity, and, in all other respects, with the note held by the plaintiff, with the single exception that the note described in the notarial act is said therein to be secured by mortgage of certain land, according to an act mortgage which is referred to. The defendant contends that the note contemplated by the transfer cannot be the same note held by the plaintiff, because this note exhibits no notarial *paraph*. He refers to the 3347th article of the Code, which directs that every notary before whom an act shall have been made, by which notes to order have been given in payment of a debt bearing a privilege or mortgage, shall attest each of the notes by putting his name on them, mentioning the date of the act from which the privilege or mort-

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gage is derived, under the penalty of damages. This article is directory to the notary; and the *paraph* is not essential to the existence of the mortgage. Hence when the mortgagee desires to enforce his mortgage, he will be permitted to establish the identity by evidence *aliunde*. See *Succession of Johnson*, 3 Rob. 217. It is obvious therefore, that the absence of the *paraph* in the present case is not inconsistent with the identity of the note which the plaintiff holds, with that contemplated in the notarial assignment. Then the only question is, whether the presumption of identity arising from the correspondence of date, amount, parties, rate of interest and maturity, is to be disregarded and treated as a weak and unsatisfactory presumption, solely because the note before us bears no *paraph*, and that described in the notarial transfer was a note for which a mortgage was therein said to have been given. We think it should not be so treated; but that, on the contrary, the evidence, coupled with the possession of the note, raises a presumption of identity, which may, in the language of the Code, be characterized as "*grave, precise, et concordante*;" justifying a reasonable conviction, and throwing upon the defendant the burden of showing the existence of another note of like description, having been actually given by himself, the mortgagor referred to in the act of assignment.

It is very certain that *Phelps* would never be permitted to recover from the defendant upon this note, even if he could hereafter prove, which we have no reason to believe he could do, that it was not the note assigned to the plaintiff, and that the plaintiff got possession of it wrongfully, unless, at least, he could also show that *Elliott* had in his power the means of disproving the presumption of identity created by the act of transfer, and neglected to use them. It would be *prima facie* a sufficient answer to him to say, he had put into the hands of the present plaintiff an instrument describing the note transferred in such terms as to justify the conviction that it was the note now in question, and that if the note really transferred bore a notarial *paraph* it was his own fault that he did not say so in the assignment.

It is proper to observe that, the defendant does not state in his answer, nor even directly assert in argument, that he had given *Phelps* another note of like tenor with this. It is also to be observed that the plaintiff simply asks a personal judgment against *Elliott*, and does not ask, in this suit, to enforce the mortgage.

It is therefore decreed, that the judgment of the court below be reversed, and that the plaintiff recover of the defendant the sum of \$458 92, with interest thereon from the 6th December, 1841, until paid, and the costs of this suit in the court below and those of the appeal.

HILL v. NOE.

Fees paid to counsel for prosecuting an injunction against an illegal order of seizure and sale cannot be recovered by the plaintiff against the defendant, where the injunction is maintained.

APPEAL, by the defendant, from a judgment of the District Court of Jefferson, *Clarke, J.*, maintaining an injunction taken out against an order of seizure illegally issued. *Brewer*, for the plaintiff. *Marks* and *Hiestand*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by

SMEDEE, J. The order of seizure and sale upon which the various writs issued was irregular. *Hill* was dead when the suit was instituted; yet he was named as the defendant in the cause. The *pluries* writ was objectionable on the additional ground that, when it issued the decree enjoining *Noé* stood unreversed.

The only change which the judgment requires is, as to the allowance of \$150 as damages for the expense incurred by the plaintiff, for professional services in prosecuting this suit. See *Smith v. Bradford*, 17 La. 266.

It is, therefore, decreed that the judgment of the District court be amended, by striking therefrom the allowance of \$150; and that, in other respects, the judgment be affirmed; the costs of the appeal to be paid by the succession.

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v.
NOE.

JOBERT et al. v. PITOT, Executor &c.

The testimony of witnesses is admissible to prove that a person, alleged to be the mother of a child, presented the child to the priest for baptism and declared herself to be its mother, though the certificates of birth and baptism of the child had been previously offered in evidence, by the same party, to prove the same facts.

The acknowledgment of an illegitimate child, which the law requires to be made before a notary in the presence of two witnesses, when not made in the registry of birth or baptism, is that of the father. Illegitimate children may prove their natural maternal descent, and the acknowledgment of their mother, by any legal evidence. C. C. 221, 230.

In an action by the father and sister of a testatrix against her executor, to annul a testament by which an acknowledged natural child was made her universal legatee, letters of the testatrix are inadmissible, where the father had remained unknown, to show that the instituted heir was an adulterous bastard child. Natural paternal descent could not be proved against the heir in such an action. *Per Curiam*: We do not mean to say that the acknowledgment of the mother is an absolute title against her legitimate heirs; but, as she was free, they can only oppose to it that it is false, or made in fraud of their rights.

The heirs of the father and mother will not be allowed to prove that a child, acknowledged by a father who was free, was an adulterous bastard on the side of its mother, who had remained unknown. This is equally true, where the mother has acknowledged the illegitimate child, and the father is unknown.

APPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Blache*, for the appellants. *Denis*, for the defendant. The judgment of the court (*King, J.* absent,) was pronounced by

ROST, J. This action is brought by the father and sister of *Marie Adeline Jobert*, deceased—one as forced heir, the other as heir at law—to set aside her will, on the ground that the universal legatee therein named, is the adulterous bastard child of the testatrix on the side of his father, and as such incapable of taking by will any thing more than alimony, and such a sum as may be necessary to instruct him in a profession or trade. There was judgment in favor of the defendant, and the plaintiffs have appealed:

On the trial below, the defendant's counsel having introduced in evidence the certificates of birth and of baptism of the instituted heir, representing him to be the son of the testatrix and of a father unknown, further offered a witness to prove that the testatrix was present at the baptismal ceremony, that she presented the child to the priest, declared herself to be the mother of it, and held it in her arms during the ceremony. The plaintiffs opposed the introduction of this testimony, on the ground that no parol evidence could be received against or

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v.
PIROT.

beyond what is contained in the acts of birth and baptism, and that it was also inadmissible to prove the acknowledgment of the child by his mother. These objections were overruled, and the plaintiffs excepted to the opinion of the court.

We are of opinion that the evidence was properly admitted. The acknowledgment of an illegitimate child, which the law requires to be executed before a notary in presence of two witnesses, when it has not been made in the acts of birth or baptism, is that of the father. Illegitimate children may prove their natural maternal descent, and the acknowledgment of their mother, by any legal evidence. C. C. 221, 230.

The plaintiffs' counsel then offered in evidence letters alleged to have been written by the testatrix, whose hand writing and signature thereto they, at the same time, offered to prove, in order to show that the instituted heir is the adulterous bastard child of the deceased, in the manner alleged in the petition. The counsel for the defendant objected to the introduction of this evidence, on the ground that natural paternal descent could not be proved against him in this suit, and the court, having sustained the objection, the plaintiffs took a bill of exceptions.

At the time of the conception and birth of the legatee, his mother was free, and it is proved that he has been acknowledged by her. The plaintiffs, as heirs of the mother, seek, as already stated, to annul her will in his favor, on the ground that, at the time of his conception and birth, his father, who has heretofore remained unknown, was a married man.

This case materially differs from those of *Jung v. Doriocourt*, 4 La. 175, and *Robinet v. Verdun*, 14 La. 542. In both of these cases the legatees were children of color, and the plaintiffs claimed as heirs of the father, who was a white man. Had the claims been made by the legal heirs of the mother, as in this case, we presume the decisions would have been otherwise. We do not mean to say that the acknowledgement of the mother is an absolute title against her legitimate heirs. But as she was free, they can only oppose to it that it is false, or made in fraud of their rights. They cannot be permitted to attenuate its force, or to change its results, by going into a scandalous inquiry of matters *en pais*, not personal to the testatrix. "Les héritiers du père et de la mère peuvent combattre la reconnaissance, à l'ouverture de leur succession. Mais ils ne pourront demander à prouver qu'un enfant reconnu par un père libre est adultérin, du côté de sa mère, restée inconnue." 2 Toullier, no. 966. This proposition appears to us equally true when the mother has acknowledged the illegitimate child, and the father is unknown.

We conclude, therefore, that the evidence offered was properly rejected by the court.

The testatrix having left no legitimate descendants, her natural child could acquire from her by donation *mortis causâ* the whole amount of her succession; and the act of her last will being in due form, our judgment must be in his favor. C.-C. 1471.

Judgment affirmed.

CRANE v. MCGREW.

An order, by which a rule taken against a sheriff by the plaintiff in an action is made absolute, holding the sheriff to be personally liable to the plaintiff for any judgment that

may be rendered therein, in the same manner as certain sureties, taken by him in a bond on which property was released, would have been liable, had they been found good and sufficient, is not a final judgment, nor one from which an appeal can be taken by the sheriff.

CRANE
v.
McGREW.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. J. N. Lea*, for the plaintiff. *T. R. Wolfe*, for the defendant. *R. Hunt*, for the sheriff, appellant. The judgment of the court (*King, J.* absent,) was pronounced by

EUSTIS, C. J. *John L. Lewis*, who is the sheriff of the parish of Orleans, took an appeal from an order of the Fourth District Court of New Orleans, by which a rule taken against him by the plaintiff in this suit was made absolute, holding him, the said sheriff, to be personally liable to the plaintiff in this suit, for any judgment that might be rendered therein, in the same manner as certain sureties, taken by said sheriff in a bond on which property was released, would have been liable, had they been found good and sufficient. We are of opinion that this is not a final judgment, nor one from which, according to the uniform decisions of this court, an appeal can be taken.

Appeal dismissed.

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CONREY v. COPLAND.

Art. 1987 C. C. is repealed by art. 647 C. P., so far as they are inconsistent with each other. The word *office*, in arts. 1987 C. C. and 647 C. P., means a *public* office. The commissioners appointed under the stat. of 14 March, 1842, providing for the liquidation of banks, are not public officers.

An amount due to a commissioner, appointed to liquidate a bank under the stat. of 14 March, 1842, for arrears of salary, will be extinguished by compensation, where the bank was a judgment creditor of the commissioner for an equal amount.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* This proceeding was instituted by *Conrey*, as the purchaser of the assets of the Merchants' Bank. *Lockett and Gould*, for the plaintiff. *Hamner*, for the appellant. The judgment of the court (*King, J.* absent,) was pronounced by *EUSTIS, C. J.* This is an appeal taken by *Robert Copland*, the defendant, from a judgment of the Fifth District Court of New Orleans, by which a debt of \$1,166 66, due the appellant, being the balance of his salary as one of the commissioners of the late Merchants' Bank, which had been allowed on a tableau of distribution as a privileged debt, was held to be partially extinguished by the amount of two judgments rendered in favor of the commissioners of the Merchants' Bank against said *Copland*.

It is contended by the counsel for the appellant that the compensation between these debts cannot take place, the debt due to *Copland* being the salary of an office, and as such not liable to the payment of debts. Art. 647 of the Code of Practice provides that, "if the debtor has neither moveables, nor slaves, nor immovable property, the sheriff may seize the rights and credits which belong to him, and all sums of money which may be due to him, in whatsoever right, unless it be for alimony or salaries of office."

Art. 1987 of the Civil Code considers money due for the salary of an office (*emploi public*), wages or recompense for personal services, as not liable to the payment of debts. But this article of the Code of Practice (647) has been held to repeal this part of art. 1987 of the Code (*Vance v. Lafferanderie*, 4 Rob. 341); and we have only to consider whether the article of the Code of Practice ex-

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v.  
COPLAND.

empts the appellant's salary from the ordinary operation of mutually subsisting debts.

*Copland* was one of the commissioners appointed under the act of 1842 for the liquidation of insolvent banks. He was appointed by the bank presidents.

It is evident that by the article of the Civil Code alluded to, the word *office* meant a *public office*; the french text is conclusive as to its meaning. The expressions *salaries of office* in the 647th article of the Code of Practice, do not change that sense, and the french text—"salaires d'*office*" is still more restrictive, and indicates a public office and nothing else. *Merlin, Rep. de Jurisp. verbo Office. Domat, Droit Public, liv. 2, tit. 1, sec. 1.*

It is true, as contended by the counsel for the appellant, that, by the bank act of 1842, the State undertook, by the instrumentality of the commissioners appointed, to liquidate and settle the affairs of the insolvent banks, under the control of the courts. The direction in that act that one commissioner should be appointed by the bank presidents and another by the stockholders of each bank, we do not consider as constituting the persons thus appointed public officers, within the meaning of our laws and constitution.

*Judgment affirmed.*

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### ALLING v. THE CITIZENS' BANK et al.

The decision in *Bertoli v. Citizens' Bank*, 1 An. 119, that no sale, whether judicial, forced or voluntary, of property mortgaged to the Citizens' Bank, can in any manner affect the rights secured to that institution by the 24th section of its charter, applies to the case of a sale made without the consent of the bank and for a sum insufficient to satisfy their claim.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J.* and *H. H. Strawbridge*, for the plaintiff. *Pilot*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

*Rost, J.* The plaintiff has enjoined an order of seizure, obtained by the defendants on two mortgages subscribed by him in their favor.

The facts of this controversy are identical with those of *Bertoli* against the same defendants, reported in 1 An. p. 119, with the single exception, that, in *Bertoli's* case, the sale of the property mortgaged was made without the participation or knowledge of the bank, while in this the bank authorized the syndic to sell, on condition that the purchaser should assume all the obligations of the insolvent to them, and take the property subject to the stock mortgage. The District court considered that, although the defendants may not be bound by the proceedings in bankruptcy of their debtors, they may waive that privilege, and, being of opinion that they had done so in this case and made themselves parties to the proceedings, perpetuated the injunction. The defendants have appealed.

The defendants authorized the syndic of the creditors of *Donlin*, the insolvent debtor, to sell the property mortgaged to them, on condition that the purchaser should assume the stock mortgage and pay all sums actually due them. After this authorization, *Hoffman*, the legal adviser of the syndic, and one of the commissioners of the bank, called upon the cashier, and presented to him a manuscript advertisement of the syndic's sale, with a blank space left in it for the insertion of a description of the nature and amount of the obligations due the Citizens' Bank. The cashier inserted in this blank, the description of a stock

note of \$1,200, maturing on the 1st of May, 1847, and returned the advertisement, which was then duly published. After the legal delays, the property with the stock upon it, was adjudicated to the plaintiff, for a sum more than sufficient to pay all the claims which the defendants really had upon it. The syndic, having raised all the mortgages on the property except the stock mortgages, executed the act of sale to the purchaser, and received the price in money and notes, including the stock note. This sale was passed by a notary, who was then the acting president of the board of the Citizens' Bank, and the title papers of *Donlin* were delivered to him by the officers of the bank, for the purpose of enabling him to pass it. *Lesassier*, the cashier, testifies that about this time he sent to the syndic a memorandum of the cash indebtedness of *Donlin*, but cannot state whether he mentioned therein the nature of the indebtedness, and that it was secured by mortgage.

In due course of administration the syndic filed his tableau of distribution, on which he placed the defendants as ordinary creditors for \$1,698. After the usual advertisements, this tableau was homologated, without opposition from the defendants, and, under the order of court, the assets in the hands of the syndic, with the exception of the last note furnished by the plaintiff, were paid over to the creditors.

The plaintiff, having subsequently called upon the defendants for a transfer of the stock to him on their books, was met by the cashier with a demand for the sum of \$1,698, alleged to be due the bank and secured on the property sold by a mortgage subsequent in date to the stock mortgage. This debt and mortgage appearing to exist on the books of the bank, they declined to transfer the stock; and on the refusal of the plaintiff to pay the sum claimed, took out against him for this amount, and for that of the stock note, the order of seizure which he has enjoined.

The reason given by the cashier why he did not mention the mortgage in the advertisement—because his understanding was that it should be paid in cash, and that the syndic was to pay the money to the bank, is quite unsatisfactory, and can in no manner benefit the defendants. It shows that the bank had joined in the proceedings of the other creditors, and looked to the syndic for payment. This arrangement as made, was perfectly legal; it enabled the defendants to collect, without any expense or loss of time, what was due to them, and to obtain a solvent instead of an insolvent stockholder. It was faithfully carried into effect by the syndic, and a sufficient sum realized by the sale to satisfy their entire claim; that this sum was not thus applied, is attributable exclusively to their negligence. Their claim was not filed with the syndic as a mortgage claim, and they suffered the tableau to be homologated without making opposition, notwithstanding the cashier's declaration that he looked to the syndic for payment.

It is true we said in the case of *Bertoli*, that no sale, whether judicial, forced, or voluntary, of property mortgaged to the Citizens' Bank, can in any manner affect the rights secured to that institution by the 24th section of their charter. But this of course applies to a sale made without the consent of the bank, and for a sum insufficient to satisfy their claim. Here the bank was a party to the proceedings of the creditors. On the faith of their authorization that the property should be sold, the plaintiff purchased, and the price he paid, though more than sufficient to pay the bank debt, was lost to them through the negligence of their officers. It would be unjust to throw this loss upon an honest purchaser, and there is no warrant of law for doing so.

*Judgment affirmed.*

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## HARNED v. CHURCHMAN et al.

Where the consignees of a vessel, who had had other transactions with the owner, make advances to the captain, for services and supplies furnished to the vessel, for towage, pilotage, custom-house charges, and furnish him with cash for other purposes not shown, and, though informed by the owner of his intention to sell the vessel, take a bill of exchange on him, drawn by the master at thirty days, for the amount, and permit the vessel to depart, they must be considered as having made the advances solely on the personal credit of the owner, and cannot claim any lien, or tacit hypothecation, for the amount advanced, on the vessel in the hands of the vendee of one who had purchased the vessel while on her voyage to the port to which she was consigned.

To authorize the master to hypothecate a vessel by bottomry, it must appear that the advances were made for repairs, or supplies, necessary for the voyage or the safety of the vessel, and that the repairs or supplies could not have been procured on reasonable terms, nor with funds in the master's control, nor upon the credit of the owner independent of the hypothecation. It is essential to the lawful exercise of this power that, no other means of procuring funds, at the place at which they were required, existed.

The taking of a bill of exchange upon the owner of a vessel for advances made to the master, or for amounts due to material-men, or wages to seamen, is presumptive evidence that the credit is personal to the owner, and that any lien on the vessel is waived.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Baer*, for the plaintiff, cited *The Jerusalem*, 2 Gallison, 347. *The Aurora*, 1 Wheaton, 96. 3 Kent, 132, 169. C. C. 3204. *Parish v. Crawford*, *Strange's Rep.* 1251.

*Bradford*, for the appellant, relied on C. C. 2156, 2157. *Grant v. Fiol*, 17 La. 160. *Agricultural Bank v. Barque Jane*, 19 La. 9. *Hill v. Phanix Co.*, 2 Rob. 36. *Hyde v. Calver*, ante p. 9. *Harper v. A new Brig*, 1 Gilpin, 536. *Abbott on Shipping*, (ed. 1846), pp. 200, 202.

The judgment of the court (*King, J. absent*), was pronounced by

SLIDELL, J. This suit was brought by *Harned*, as the endorsee of a bill of exchange for \$1210 20, payable at thirty days after date, drawn at Philadelphia, on the 19th February, 1848, by *James Robertson*, master of the barque *Duc d'Orleans*, in favor of *Heald, Buckner & Co.*, for their disbursements on account of the vessel in the port of Philadelphia. It was drawn on *Churchman* of New Orleans, the former owner of the barque, and was accepted by him. The bill was protested at maturity, and, on the 24th March, 1848, this action was brought against the acceptor; and *Woodruff*, the present owner of the barque, upon which a lien is claimed, was made a defendant. The barque was sequestered. The plaintiff had judgment in the court below against *Churchman*, with a privilege on the barque. *Woodruff* has appealed.

The barque left New Orleans, her home port, about the 1st January, 1848, consigned by *Churchman* to *Heald, Buckner & Co.* In a letter of the 3d January, he remarks, to them:—"I am arranging a bill of sale of the *Duc d'Orleans*, and will forward that also." The barque arrived at Philadelphia, on the 4th February, 1848, and left that port for New Orleans on the 19th. Part of her cargo was for the owner's account, so that her freight list to Philadelphia produced only \$443 95, which was collected by *Heald, Bukner & Co.*, and carried by them to *Churchman's* credit in account. They had had previous dealings; and the antecedent charges against *Churchman* seem to have been more than sufficient to absorb the freight money. The vessel, while at Philadelphia, incurred various

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expenses for services and supplies by carpenters, sail-makers and chandlers, for towage, pilotage, custom-house charges, &c; for the payment of these, and also in the form of cash advances to the captain (for what purpose, or upon what representation, does not appear,) *Heald, Buckner & Co.* disbursed a sum which amounted, with the customary commission and interest, to \$1210 20; and for this amount the captain's bill on *Churchman* was taken.

*Churchman* sold the barque on the 11th, January, 1848, to *De Coverly* and others. The purchasers got out a new register, on the 18th March, 1848. They resold the barque at auction, on the 23d March, 1848, to the appellant.

It may be conceded, for the purpose of the present enquiry, that, by the transfer of the bill of exchange, the holder may be considered as equitably invested with any accessory rights which accompanied it in the hands of the payees, who made the advances in consideration of which it was drawn.

Looking to all the facts of this case, we think it has been properly said by the appellant's counsel that, the money must be considered as having been advanced solely on the personal credit of the owner. He was the former correspondent of *Heald, Buckner & Co.* They were consignees of the vessel. They also were aware that he contemplated selling her. They permitted the vessel to depart, and took a bill of exchange at thirty days, on *Churchman*, payable in New Orleans, for the amount of the advances.

In a very extended examination of the authorities upon the maritime law, we have not met with a single case, where, under like circumstances, a tacit hypothecation of the vessel in favor of the consignee has been recognized. If we look to the doctrine of special hypothecation or bottomry, the well settled principles of the maritime law respecting the contract are pregnant with an implication against the plaintiff's pretensions. The writers are unanimous in a jealous restriction of the captain's power to hypothecate by bottomry. It must appear that the advances were made for repairs, or supplies, necessary for the voyage, or for the safety of the ship, and that the repairs or supplies could not be procured on reasonable terms, or with funds within the master's control, or upon the credit of the owner independent of the hypothecation. See Kent's Com. p. 171.

*Benecke*, in speaking of bottomry, remarks: "It frequently occurs, that the master of a vessel is under the necessity of borrowing money abroad, for the purposes of the voyage. If this happens at a place where the owner of the vessel has friends or correspondents, the master applies to them first; and they usually furnish him with the money required, for which they draw bills, including commission and interest, either the owner, or on such other house as he may direct. But if, either the correspondents refuse to advance the money, or if it be wanted at a place where the master is not able to raise it upon bills, he is often reduced to the necessity of mortgaging, according to circumstances, either the vessel, or the vessel and cargo." In *Rucker & Co., v. Conyngham*, 2 Peters' Ady. 302, Judge Peters observes: "It is essential to the lawful exercise of this power that, no other means of procuring funds at the place required, should exist. Of course, if the owners have agents or consignees, who have either funds or property to furnish, or are bound to afford means on the personal credit of the owners, this power in the captain is excluded." *Mr. Jacobson*, citing the ordinance of *Billbao* as his authority, says the master, if he requires money for the prosecution of the voyage which he cannot have advanced upon his average money, or obtain by bills upon his owners, is authorized to lien the ship by bottomry. *Laws of the Sea*, p. 359. In the case of the *Alexander*, 1 Dodson, 279, Sir William Scott sustained a bottomry bond given to the consignee of the cargo,

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saying that as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself for their security. See also Holt on Shipping, vol. 1. 399. *The Aurora*, 1 Wheaton, 104. Smith's Mercantile Law, 350:

The plaintiff's counsel has cited *Boulay Paty* in support of the tacit hypothecation or privilege. The language of that author is: "Le privilège n'en compte pas moins un preteur, quoique l'acte de prêt soit tout autre qu'un contrat à la grosse. Aujourd'hui le capitaine peut avoir recours à l'emprunt simple par lettre de change, ou autrement, pour subvenir aux nécessités du navire." Cours de Droit Commercial Maritime. The case of the owners, consignees and correspondent is not mentioned by this writer as falling within the rule. But however that may be, it must be observed that he is commenting upon the special legislation of the french Code of Commerce, and that the privilege which it grants, is not recognized, without the observance, at the time of the loan, of formalities which seem to point to a contemplation of the credit of the vessel as well as that of the owner. See Code of Commerce, 191, 192, no. 5.

In looking into the english and american authorities we find that, the taking of a bill of exchange upon the owner is considered as creating a presumption that the credit is personal. Thus, in the case of a mariner, whose claim is peculiarly favored in admiralty: a sailor having been offered his wages in money, elected to take part thereof in a bill of exchange on the owner, who afterwards became a bankrupt, in consequence of which the bill was dishonored. It was held that he was not entitled to arrest the ship for wages to the amount of such bill, on the ground that, having made his election, he must stand by the risk. *The William Money*, 2 Haggard, 136.

In *Murray v. Lazarus*, 1 Paine, 572, the case was thus: The vessel, bound from New Orleans to New York, put into Wilmington in a damaged state, when the master, having no other means, obtained advances from the libellants for the necessary repairs, and gave them a draft for the amount on his consignees, which was expressed to be for value received "in disbursements and repairs of the brig *Hannah*." It was protested for non-acceptance; and, on a libel against the freight in the hands of the consignees, it was held that, the taking of a draft was a waiver of the lien, if any existed.

In the case of the brig *Nestor*, 2 Sumner, 87, Mr. Justice Story remarked that the receipt by a material-man of the owner's negotiable note, "is direct proof that credit is given to the personal responsibility of the owner, and presumptive proof that no credit is given to the ship; or, in other words, that there is a waiver of any lien on the ship. It cannot be ordinarily presumed that a ship owner, giving a negotiable note for supplies, intends, at the same time, that a lien shall exist on the ship itself for the debt; for the lien might be in the hands of one person, and the negotiable security in the hands of another. To bring the present case within the reach of that decision it should be shown that, a promissory negotiable note of the master, or owner, had been taken by the libellant."

It is certainly very difficult to reconcile the opinion in the case of the *Nestor*, and that of Lord Stowell, in 2 Haggard, with the subsequent opinion in the case of the bark *Chewson*, 2 Story, 466. But, whatever be the weight of the later opinion, the case is distinguishable in this respect from the present, that there the material-man was the libellant, and here the tacit hypothecation or privilege is claimed by the owner's correspondent, the consignee of the vessel.

It is the duty of courts, in all commercial nations, to extend the rule of national comity to bottomry bonds, and such other maritime hypothecations as are recogni-

zed by the general assent of the commercial world. But the public policy of recognizing implied hypothecations or liens, as following property from foreign countries, may well be questioned. That is also a safe rule of our jurisprudence, which regards privileges as *stricti juris*, and not to be extended to doubtful cases.

It is, therefore, decreed that the judgment of the court below, as to said *Woodruff*, be reversed, and and that there be judgment in his favor; and that the claim of privilege upon the said *barque Duc d'Orleans* be rejected; the cost of the sequestration, of the proceedings against *Woodruff*, and of this appeal, to be paid by the plaintiff.

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### BACCHUS v. MORREAU.

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On an appeal from a judgment in favor of two or more parties, a bond made payable to one of the appellees "*et al.*", will be good. The expression "*et al.*" must be considered as referring to all the other appellees, and the bond will be available to all of them.

Where one of two appellees has not been cited, the judgment cannot be touched, so far as he is concerned; but the omission is no obstacle to the consideration of the case as to the party cited, where the interests of the two are separate, and susceptible of being separately determined.

Where the vendor of a tract of land having one arpent and three-quarters front, received five-sevenths of the price in cash, and, for the balance, took a note of the purchaser, identified with the act of sale by the paraph of the notary, the act reciting that, "pour assurer le paiement du dit billet à son échéance, ainsi que de tous frais et intérêts, hypothèque spéciale est réservé seulement sur trois quarts d'arpent du côté d'en haut de la dite propriété, l'acquéreur s'obligeant de ne les point aliéner, ou hypothéquer, au préjudice des présentes," the vendor's privilege not being necessarily inconsistent with this clause, will be considered as retained upon the whole tract; nor can the enforcement of the mortgage, by an order of seizure and sale, operate as an implied renunciation of the privilege.

The renunciation of the vendor's privilege must be express; or result by cogent implication.

A mere doubt will not suffice to deprive a party of what the law presumes in his favor. A mortgage and privilege may co-exist on the same thing. They are distinct rights, not exclusive of each other.

Where a note is made payable two years after date, but the maker, on its face, "reserves to himself the right to postpone payment for five years," and the latter makes no tender of payment at the end of two years, nor subsequently, he must be considered as having availed himself of the reservation; and prescription will not begin to run against the payee until the expiration of the term of five years.

Where the testimony as to a judicial sale is conflicting, it will be insufficient to destroy the legal presumption that the sheriff did his duty.

An agreement made by the sheriff with a purchaser, subsequently to the adjudication at a judicial sale, that the price should remain in the hands of the sheriff until a good and satisfactory title was given, and, in default thereof, that he would return it, cannot invalidate the adjudication.

**A** PPEAL from the District Court of Jefferson, *Clarke, J. Graihle*, for the appellant, cited C. C. 3153, 3216. 12 Rob. 279. C. P. 732, 733, 734, 736, 737, 744. *Collens*, for the defendant, cited 16 La. 109. 7 La. 91. The judgment of the court (*King, J.* absent,) was pronounced by

**SLIDELL, J.** The plaintiff had previously sold a portion of a tract of land, purchased from him by *Moreau*, under an order of seizure and sale granted upon a mortgage of that portion. Afterwards, he obtained an order of seizure and sale, by virtue of the vendor's privilege, upon the residue. After the second adjudication, which was made to *Mrs Waggaman*, he took a rule upon *Caubette*,



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a mortgagee claiming under a mortgage inscribed after the inscription of the plaintiff's sale to *Moreau*; upon *Fische*, the holder of a subsequent judicial mortgage; and upon the sheriff, to show cause why the subsequent mortgages should not be cancelled, a clear title given to *Mrs. Waggaman* and the proceeds of sale applied to the satisfaction of the plaintiff's claim. The district judge dismissed the rule, and the plaintiff has appealed.

*Caubette* has asked the dismissal of this appeal, on the ground that no bond was given in favor of the other parties to the proceeding, and that they have not been cited. The bond is given in favor of *Caubette* "*et al.*" Under these expressions, which must be considered as referring to all the other parties in the cause, the bond would have been available to all the appellees, and cannot therefore be considered defective. But it does not appear that the other appellees have been cited. This will prevent us from touching the judgment, so far as *Fische* is concerned; but is no obstacle to a consideration of the case as to *Caubette*; for the parties have separate interests, which are susceptible of being separately determined.

The principal question in this case is, whether in this act of sale by *Bacchus* to *Moreau*, the former is to be considered as having relinquished the vendor's privilege. The sale was of a tract of land containing one arpent and three-quarters front, by forty in depth. The total price was \$7000. The vendor acknowledges a cash payment of \$5000; and for the residue *Moreau* gives his note for \$2000, paraphed for the purpose of identifying it with the act. The description of the note is followed by a clause in these words: "Et pour assurer le paiement du dit billet a son échéance, ainsi que de tous frais et intérêts, hypothèque spéciale est réservé seulement sur trois quarts d'arpent du côté d'en haut de la dite propriété; l'acquéreur promettant et s'obligeant de ne les point aliéner, ou hypothéquer, au préjudice des présentes."

The appellee must concede that, if the act had contained no stipulation of mortgage, the vendor's privilege, which results by operation of law, from the nature of the contract, and needs no express stipulation of the parties (C. C. 3153, 3216), would have extended to the entire tract. But it is said the language used is inconsistent with, and excludes the vendor's privilege; that the vendor must be considered as having relinquished the privilege upon the entire tract, and contented himself with an encumbrance, for his security, upon the three-quarters of an arpent only.

As covenants oblige not only to what is expressed in them, but likewise to every thing which the nature of the covenant demands, and to all the consequences which the law gives to the obligation, it is obvious that the existence of the vendor's privilege in the present case is supported by a legal presumption, which throws the burden of proof on the party against whom it militates. *Donce probatione aut presumptione contraria fortiore enervata fuerit.* On the other hand, it is equally true that a party may renounce what the law has established in his favor; but the intention to renounce a right implied by law should be clear. The renunciation should either be express, or it should result by cogent implication. A mere doubt, would not suffice to deprive a party of the benefit of what the law presumes in his favor. Thus the law implies a lien in favor of the factor; but he may renounce it either by an express stipulation to the contrary, or, impliedly, by assenting to a state of things inconsistent with the right to retain and enforce his lien.

The true test then of the rights of these parties is the consistency or inconsis-

tency of the clause in question with the existence of the vendor's privilege. If it is not necessarily inconsistent, the legal presumption must stand.

If the parties had reversed the order of the words used, and had said "a mortgage only is reserved," there would have been strong reason to infer the relinquishment of the vendor's privilege. It would seem inconsistent to claim a privilege, after agreeing that a mortgage *only* should be taken as security for the debt. But as the contract is written, the word "*seulement*" is not only susceptible of being referred to the quantity proposed to be mortgaged, that is to say, to only three-quarters of an arpent of the whole tract sold, but such is the grammatical construction of the clause as written. We do not say that this construction meets the intention of the parties, beyond the possibility of a doubt. But, as already observed, the legal presumption in favor of the vendor cannot be overthrown, except by a cogent and clear implication.

It is unnecessary to enlarge further upon the subject of the vendor's lien and its renunciation, which has been fully considered in the case of *Bonerv. Mahle*. 3 An. 600. See also *Citizen's Bank v. Cuny*. 12 Rob. 297. If the vendor's privilege on the whole tract was not renounced by taking a mortgage upon a portion of it, it is obvious that the enforcement of that mortgage by an order of seizure and sale of that portion could not operate as an implied renunciation. The mortgage and the privilege are distinct rights. They may coexist. The one does not exclude the other; and the enforcement of the mortgage did not conflict with the privilege, which still subsisted upon the residue of the property sold.

The plea of prescription is clearly untenable. The note of \$2000 was dated in 1841, and promised to pay two years after date, but with the following condition or reservation:—"I reserve to myself to postpone payment for five years from maturity." As the promisor made no tender of payment at the end of the two years, or subsequently, he must be considered as having availed himself of this reservation in his favor. The creditor cannot be considered to have renounced his action; because if he had brought suit before the expiration of the stipulated term, he could not have sustained it. *Quisenim incusare eos poterit, si hoc non fecerint, quod etsi maluerint, minime adimplere lege obviante valebant*. Code, lib. 7, tit. 40. De annale exceptions.

The act of sale appears to have been properly recorded, so as to preserve the vendor's privilege. The sheriff, after he sold the portion mortgaged under the order of seizure and sale upon the mortgage, was without authority to cancel the inscription of the vendor's privilege as to the residue of the land. Indeed, properly considered, his certificate was an authorization to cancel certain "*mortgages*." It was silent as to the vendor's privilege.

An objection is made to the validity of the sheriff's sale, in consequence of the alleged circumstances of irregularity under which the adjudication was made by the sheriff. It appears that the recorder's certificate was read by the sheriff, which, after reciting the inscription of the act of sale, stated that the "*mortgage* above stipulated was cancelled and annulled." The sheriff and a by-stander have been examined as witnesses. The sheriff deposed that he read the entire certificate, and that no difficulty arose until after the adjudication was made. The other witness states that, after the certificate was read, and before the adjudication, he asked the sheriff whether the property was sold on the first privilege, or whether there were other mortgages having preference. That thereupon a conversation ensued between the plaintiff's attorney and the sheriff, when the sheriff stated that the terms of the sale would be, that the price of the adjudication should

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remain in the hands of the sheriff until a clear and perfect title should be given to the purchaser. Waiving the consideration of the effect of such a conversation, if proved, upon a judicial sale, we think it sufficient to observe that the testimony is conflicting, and therefore insufficient to destroy the legal presumption that the sheriff properly discharged his duty. The return of the sheriff does not show that any unusual announcement preceded the adjudication; and his subsequent agreement with the purchaser that, the price should remain in the sheriff's hands until a good and satisfactory title was given, and, in default thereof, that he would return it, did not invalidate the adjudication.

In conclusion, we consider that the only party defendant to the rule who is before us, has shown no defence to the rule. As to the other parties to the rule, they are not before us; and, indeed, seem not to have been represented at the trial of the rule in the court below.

It is therefore decreed that, the judgment of the court below, so far as it determines the issues made between the said plaintiff and the said *Pierre T. Caubette*, be reversed; that the adjudication, made on the second day of May, 1848, to *Mrs. Waggaman*, as appears by the return of the sheriff of record in this cause, be maintained, as against the said *Caubette*; that the said plaintiff be recognized as a creditor upon the proceeds of said adjudication, by privilege superior to the said *Caubette*; and that the costs of this appeal, and of the rule, as against said *Caubette* in the court below, be paid by the said *Caubette*.

#### LESSEES et ux v. THE ARCHITECTS' COMPANY OF NEW ORLEANS.

Though it be conceded that an incorporated company, not empowered by its charter to declare the forfeiture of the shares of stockholders who may be in default by the nonpayment of installments due for the price of stock, cannot enact, through its board of directors, a by-law subjecting them to such a forfeiture, yet where, after the organization of such a company, a by-law is adopted at a meeting of the stock-holders, declaring that the failure to pay any installment due for stock shall operate a forfeiture, in favor of the company, of the shares on which such installments may be due and of all previous payments thereon, and the evidence shows that the by-law received the general acquiescence of the stock-holders, a stockholder, whose stock had been declared forfeited under the by-law, and who, though not at the meeting at which the by-law was adopted, is shown to have assented to it, and whose certificates of stock, signed by the president and secretary, and offered in evidence by himself, acknowledging the payment of the first instalment, contain, at the bottom of each, a printed copy of the by-law, will not be allowed to recover from the company, on the winding up of its business, the amount paid on his stock. *Per Curiam*: The acceptance of the certificates in the form in which they were delivered, was a tacit acquiescence in, and submission to, the by-law; and it became the law between the party by whom it was accepted and his fellow-stockholders. No rule of law forbids the stock-holders to form such a convention with each other; it is not forbidden by the terms of the charter, and cannot be held to be against public policy; and, although the silence of the charter is a strong argument against the implication of such a power as an incident to the administration of the corporation, it is no reason for frustrating the wishes and agreement of the stock-holders themselves. Regarding the question as one of contract, the stock-holder whose shares have been forfeited, has no equitable claim for relief.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* *Remy* and *Soulé* for the appellants, relied on the case of the *Long Island Railroad Company*, 19 Wendell, pp. 30, 40. See also 21 Id. pp. 275, 276. *Davis*, for the defendants, cited *Angell* and *Ames* on Corporations, p. 267.

301, 466. *Brant v. Louisiana State Bank*, 8 Mart. 310. Smith's Mercantile Law, p. 83. C. C. 424. *Noe v. Taylor*, 13 La. 249.

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The judgment of the court ( *King*, J. absent, ) was pronounced by

SLIDELL, J. The plaintiffs were subscribers for sixty shares, of one hundred dollars each, in the stock of the Architects' Company, and had paid four instalments. In 1834, being unable to meet a call of two-tenths, they applied to the board of directors for indulgence, and were allowed further time. At its expiration, they failed again to pay; and after a considerable interval, they still remaining in default, their stock was declared to be forfeited at a general meeting of the stock-holders. The company ceased its operations in 1836, and went into liquidations. After reducing the assets to cash, the stock-holders were enabled to realize their capital, and a small excess of about six per cent. The stock-holders, although they have got back their capital and this small excess, are still virtually large losers, when we take into consideration the loss of interest upon the investment of many years. The plaintiffs were excluded from a participation in the distribution of the assets, and brought the present action, in 1847. They alleged no tender of the unpaid instalments, at any time since the declaration of the forfeiture. The defendants pleaded the forfeiture, insisted upon its legality, and also prayed that, if the declaration of forfeiture be considered illegal, it might be judicially pronounced, and judgment rendered for the defendants.

The charter of the company does not contain the grant of power, not uncommon in charters, and which is found in several granted by this Staté, namely, that of declaring the forfeiture of the shares of a defaulting stock-holder. It may be conceded that an incorporated company has not the power to create, through its board of directors, a by-law subjecting stock-holders to such a forfeiture, unless the power to pass such by-law be expressly granted by the charter. See the *Matter of the Long Island Rail Road Company*, 19 Wendell, 37. But, in our opinion, the question presented here is one of contract, and not of corporate power under the charter. After the organization of this company a meeting of stock-holders was held, and by-laws were adopted, of which one was in these words: "Tout actionnaire qui manquera d'effectuer son paiement sur une ou plusieurs actions, perdra, au profit de la compagnie, tous les paiemens qu'il aura déjà fait sur les dites actions". The plaintiffs do not appear to have been present at the meeting; but it is obvious from the evidence that, the by-law or rule received the general acquiescence of the stock-holders, and, among them, that of the plaintiffs. The very certificates of stock offered in evidence by the plaintiffs, show the terms upon which they embarked their money in the common undertaking. The certificates are in a printed form, filled up with the names of the plaintiffs and the amount of shares, acknowledging payment of the first instalment, and signed by the president and secretary. At foot is printed the by-law above stated. The acceptance of the certificates in this form is a tacit acquiescence in, and submission to, the by-law; and became the law between the plaintiffs and their fellow stock-holders. When the plaintiffs addressed a letter to the board, in 1834, asking indulgence, they expressly acknowledged the rights of the corporation to forfeit the stock, and appealed only to the liberality of the directors.

We know of no rule of law which forbids stock-holders to form with each other a convention of this nature. It is not forbidden by the terms of the charter, and certainly cannot be held to be against public policy. The necessity of prompt and punctual performance of this duty by stock-holders, in order to accomplish the corporate objects for which they have associated, had suggested the specific grant of power to boards of directors which is found in so many charters; and,

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although the silence of the law-giver in a particular charter, is a strong argument against the implication of such a power as an incident to the administration of the corporation, it is no reason for frustrating the wishes and agreement of the stockholders themselves.

Regarding this question then as one of contract, have the plaintiffs presented an equitable claim for relief. They have clearly assented to the agreement, in common with their fellow-stockholders, that they would lose, for the benefit of the rest, all instalments paid, in case of failure to pay any future instalment. This agreement was framed with a prudent view to the success of the common enterprise, that so the corporation might be enabled to accomplish the purposes of its charter, and shelter itself from sacrifices, in case of emergency, by the prompt obedience of its members to a call for funds. The other stockholders did their duty; the plaintiffs failed to perform theirs, were confessedly in default, and, after a lapse of several years, without a tender of performance at any period of this long interval, ask to be placed upon an equal footing with their associates in the distribution of assets, which, but for the punctuality of those associates, might now have no existence. If there be a power in the court to relieve a party, under such circumstances, from a penalty for his default, stipulated by himself, it is at most a power resting in the sound discretion of the court, and not to be exercised unless the penalty appear excessive, and the court have also the means of decreeing a just compensation for the breach.

We are of opinion that the present case is not one in which we could relieve the plaintiffs, with the certainty that we would not be doing injustice to the punctual stockholders. The penalty, in reference to the nature and object of the contract, does not appear to us excessive or unjust; and the plaintiffs are therefore left to those consequences of their own default, to which they agreed to submit themselves.

It is therefore decreed that, the judgment of the court below be reversed, and that there be judgment in favor of the defendants, with costs in both courts.

### LAYTON et al. v. CHALON et ux.

Where one, who had sold a tract of land in another State, with a warranty of title, by an act regularly recorded according to the laws of that State, acting under the impression that the sale did not convey the legal title, and with a view to defraud his vendee, sells the same land to a third person, who takes possession of it; but, by the *lex rei sitæ*, the original vendee could not have been evicted in an action by such third person, and his intrusion on the land, being a trespass which the original vendee might have prevented, giving him no claim against his vendor under his warranty, and there being no evidence of any damage to the first vendee by the acts of his vendor to which any definite value could be fixed, the first vendee cannot recover against his vendor either the value of the land, or damages for involving him in litigation by his fraud.

A member of the bar of a State in which the common law prevails may be examined as a witness, to prove whether a party, under the circumstances of his case, could recover in any action in that State.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J.*  
*Preston*, for the plaintiffs, relied on art. 2294, C. C.

*Schmidt*, for the appellants. To maintain this action, plaintiffs must establish:  
1st. That they have been evicted, from land sold to them, by the defendants, or by those whose title defendants are bound to warrant. C. C. 2476, 2478, 2493,

2494, 2495. *Murray v. Bacon*, 7 Mart. N. S. 272. *Kemp v. Kemp*, 2 La. 244. *Bessy v. Pintado*, 3 La. 490. *Keene v. Clark*, 8 La. 117. *Bonnabel v. First Municipality*, 3 An. 699: 2d. The quantity of the land sold, of which they have been evicted, and its value. C. C. 2490, 2535 to 2538: 3d. That plaintiffs had, previous to the commencement of suit, been put in default as to the warranty of title. C. C. 2493, 2494. Not one of these requisites to maintain their action has been proved. Again, warrantors are not liable for the tortious acts of third persons. If plaintiffs have been evicted, it has been by a tort. See *Hopkins v. Van Wickle*, 2 An. 143, as to the applicability of art. 2294 C. C.

LATTON  
v.  
CHAYLON.

The judgment of the court (*King*, J. absent,) was pronounced by

EUSTIS, C. J. The defendants, *Chalon* and wife, by public act, before *Carlisle Pollock*, a notary public in New Orleans, dated the 1st of December, 1819, sold to *George Sheriff*, a tract of land situated on Pearl river, in the State of Mississippi. The tract was composed of forty arpents front, by forty in depth, was called Cabanage Latanier; and, on the 25th of January, 1827, *Sheriff* sold the upper half of the tract, consisting of twenty arpents by forty in width, to *Robert Layton*, deceased. This sale was made by deed, and both instruments appear to have been recorded in the county of Hancock, where the land was situated.

The heirs of *Robert Layton*, who are the plaintiffs in the present suit, complain that *Chalon* and wife, notwithstanding this sale of the land to *Sheriff*, in 1819, again sold the land, on the 15th of June, 1847, to *David R. Wingate*. The allegation is that, *Chalon* and wife, having been advised by *Wingate* that the notarial act in favor of *Sheriff* did not transfer to him the legal title, and combining with said *Wingate* to defraud the heirs of *Layton*, conveyed the whole of the tract to him by deed duly acknowledged and recorded; that *Wingate* took possession under said deed, and holds the part conveyed from *Sheriff* to *Layton*.

The defendants sold to *Sheriff* under a warranty of title, and *Sheriff* warranted his title in his deed to *Layton*. The executor of *Layton*, on *Wingate's* alleged possession of the land, applied to the sole legatee of *Sheriff*, who had died in the mean time, to defend the title; but she, having no property, could only transfer to the plaintiffs her right of warranty against *Chalon* and wife, which purports to have been done by deed, of date the 19th of October, 1848. On these facts the plaintiffs have brought their action against the defendants, claiming, in the right of *Sheriff*, by reason of the breach of warranty, the value of the land, and damages to the further amount of \$5000 for involving the plaintiffs in litigation by their frauds &c. The plaintiffs recovered judgment for \$514 50, as being the value of eight hundred arpents at seventy-five cents an acre, and the defendants have appealed. The plaintiffs have also asked that the judgment of the District court be amended, by rendering the defendants liable for the amount paid by *Layton* for the land, and exemplary damages.

The plaintiffs principally rely upon the testimony of *Mr. Henderson*, a gentleman of the bar, who has been extensively engaged in practice in Mississippi. We infer from his testimony that, *Layton's* heirs could not have been evicted on *Wingate's* title, in an action of ejectment, the only remedy resorted to at common law, in that State, for trying the title to land. The possession of *Sheriff* would have been available to *Layton's* heirs, and the action would have been barred by lapse of time. In a court of equity, *Wingate's* claims, founded on a fraud, as the plaintiffs themselves have alleged, would not have been heeded. *McGill v. McGill*, ante p. 262.

However we may be disposed to censure the defendants conduct in making the conveyance to *Wingate*, we are at a loss to discover any ground upon which we

LAYTON  
v.  
CHALON.

can make them liable to the plaintiffs. No eviction could have been legally caused by the conveyance to *Wingate*. His intrusion on the land was a trespass, which the heirs of *Layton* could have prevented, and which gives them no claim against their vendor, under his warranty. *Cockerell v. Smith*, 1 An. 1. 2 Pothier, *Contrat de Vente*, § 93. *Hopkins v. Van Wickie*, 2 An. 143.

And if we consider the plaintiffs as having a direct recourse in warranty against the defendants, the title which *Wingate* obtained from them, affording no warrant for disturbing the possession of the plaintiffs, and his intrusion on a part of the land being unlawful and without the sanction of any judicial authority, their claim under the warranty is equally unsupported. There is no evidence of any damage caused to the plaintiffs by the acts of the defendants, to which any definite value can be fixed.

It is therefore ordered, that the judgment of the District court be reversed, and judgment rendered against the plaintiffs, as in case of non-suit, with costs in both courts.

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### CRANE v. LEWIS, Sheriff.

An attachment will lie, in an action by the purchaser against the vendor, of a slave, alleged to have absconded from the plaintiff and to have returned to the vendor, who harbored him and refused to give him up, to recover the value of the slave, and of his services during his detention, and damages for expenses incurred on demanding him and for counsel fees. *Per Curiam*: The retention of the slave was a violation of the contract of sale; and the responsibility thereby incurred is not diminished or destroyed by an outrage, perhaps a crime, being added to it.

Where a rule has been made absolute against a sheriff, in consequence of the insufficiency of the surety on a bond given for the release of property attached, adjudging him to be bound to the plaintiff in the same manner as the surety was bound, an action will lie against him on the return of a *fi. fa.* against the principal unsatisfied.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. N. Lea*, for the plaintiff. *R. Hunt* and *Grymes*, for the defendant, appellant. *Marr*, for the appellant, *Wright*. The judgment of the court (*King, J.* absent,) was pronounced by

**EUSTIS, C. J.** On the 13th of March, 1848, *Henry Crane*, residing in the city of New Orleans, brought a suit by attachment in the Fourth District court of New Orleans against *J. C. McGrew*, a resident of the State of Alabama. Under the writ of attachment, the sheriff seized certain negroes belonging to *McGrew*, which were delivered to him, on the execution of a bond to the sheriff by *McGrew*, with *Rhodes, Wright & Co.*, as his sureties. On the 14th of June, 1848, the plaintiff obtained judgment against the said *McGrew* for the sum of one thousand and twenty dollars, with interest from date, and a *fi. fa.* having been issued on this judgment, was returned "no property found." The present suit is brought against *John L. Lewis*, the sheriff of the parish of Orleans, to make him liable to pay said judgment, with costs, on the ground that the sureties taken by him on the bond as aforesaid were not solvent and sufficient, and that the plaintiff objected to the said sureties being received, and caused a rule to be taken, as the law provides, against him, the said sheriff, on which he the said sheriff was adjudged to be bound to him, the said plaintiff, in the same manner as

the said surety would have been bound. There was judgment in the District court against the sheriff, and he has appealed.

On the part of this appellant, it is assigned for error: 1st. That the attachment, under which the bond set forth in the record was taken, was illegally and improperly issued, in a case where by law no such writ or process could issue, and that the said plaintiff was entitled to no benefit from said writ, and consequently to no benefit from the bond taken under it. 2d. That no such judgment as was pronounced by the court against this appellant, on the rule taken by the plaintiff, ought to have been rendered against him; because if the bond had been adjudged good and sufficient, the plaintiff would have no remedy upon it, and ought to have none against this appellant.

The point presented in argument, on which this assignment is founded, is, that the original action of *Crane* against *McGrew* was to recover damages for a tort, and that no attachment could legally issue in such a case, under the decision of this court in the cases of *Prewitt v. Carmichael*, 2d Annual, 943, *Swagar v. Pierce*, 3 An. 435, and *Holmes v. Barclay*, ante, p. 63.

It therefore becomes necessary to consider the nature of the action originally instituted by *Crane* against *McGrew*. The plaintiff alleged that *McGrew* was indebted to him in the sum \$1200, for that the said *McGrew*, by his attorney in fact, *Robert Anderson Harris*, on the 6th of July, 1846, sold to him, the plaintiff, a certain slave, named *New*, aged about 24 years, for the sum of \$550, the receipt of which was acknowledged. That said slave, in the month of November, 1847, absconded and returned to his original master, who received, and has since harbored him, and has refused and still refuses to deliver him up. That the petitioner went to the trouble and expense of travelling to the residence of said *McGrew*, in Alabama, in order to effect the restitution of his slave, but the defendant refused to deliver him up, and still retains him in his possession. For which reasons, the plaintiff charges that the defendant is indebted to him, not only in the value of said slave, alleged to be \$900, but for the hire of the slave, during the period of said detention, which the plaintiff estimates at \$120; and also for his travelling expenses, loss of time, and counsel fees incident to the suit, all of which are special damages growing out of said unlawful and wrongful detention of said slave, and which amount to \$180.

It appears by this petition that the defendant *McGrew* had not only broken his contract with the plaintiff, but committed a tort in harboring and depriving him of the services of his slave; but we do not understand that his responsibility incurred by the former is diminished or merged by an outrage; perhaps a crime, being superadded to it. By the contract of sale warranty against eviction is implied, and, although it is true, as a general rule, that the right of the person evicting should have existed before the sale, yet evictions proceeding from the act of the vendor himself at all times gives rise to the action of warranty. In this case the retention of the slave by the vendor was a violation of the obligation contracted by the contract of sale, *præstare servum habere licere*.

There being sufficient allegations in the petition to sustain the action *ex contractu*, we think the court would not have set aside the attachment on the grounds now presented against its legality, had they been urged on a motion to dissolve it. The evidence taken in the original case is not before us; but, from the judgment itself, it is evident that the sale was considered as the basis of the action, for the judgment rendered in the case decrees the sale to be rescinded, and the opinion of the judge in writing contains the grounds on which it was rescinded.



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v.  
LEWIS.

We therefore conclude that the judgment against the appellant, *John L. Lewis*, is not invalid, for the reasons assigned for error.

The district judge, in rendering judgment against the sheriff, gave him direct recourse against *McGrew*, the principal in the bond, and *C. P. Wright*, by whom the bond was signed in the name of *Rhodes, Wright & Co*, as surety. *Wright* also took an appeal, and has assigned for error substantially the same grounds which have been noticed. It is stated in the printed argument of his counsel that, the only question at issue before the court is, the liability of the surety in a bond given for the release of the property which has been illegally attached. This point having been disposed of, nothing remains but to affirm the judgment of the District court.

*Judgment affirmed.*

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STANBROUGH v. M'CALL.

Where an order of seizure and sale, issued for the amount of a note secured by mortgage and containing the pact *de non alienando*, is enjoined by a third person, alleging himself to be the owner of the property mortgaged by a purchase since the date of the mortgage, who, after a judgment rendered against him in the first instance, protracts the litigation by repeated appeals, such third person cannot avail himself of the time which elapsed while the plaintiff was thus judicially restrained from prosecuting his action, as part of the period necessary to extinguish the note by prescription. *Per Curiam*: One who, under the pretence of rights which have been adjudged to be unfounded, unlawfully uses the process of a court to restrain another in the prosecution of a right, cannot avail himself of the delay, which his own wrong has occasioned, to defeat that right.

One to whom a note belonging to a succession has been transferred, by the curator, irregularly, and to the detriment of the creditors or heirs of the deceased, will be considered as a trustee for them; but his possession of the note, as holder, will enable him to sue, for the purpose of arresting prescription.

**A** PPEAL from the District Court of Madison, *Selby, J. Thomas, Snyder, Bemiss and Stacy*, for the appellant. *Stockton and Steele*, for the defendant and opponent. The judgment of the court\* was pronounced by

**SLIDELL, J.** The plaintiff has been endeavoring, for seven years, to enforce his rights as a mortgage creditor upon a tract of land. In this protracted litigation he was at first opposed by *Collier*, represented by *Stockton*, as his counsel; and subsequently, by *Stockton*, in his own right.

This suit was commenced in 1842, by an order of seizure and sale, upon a note which fell due in January, 1842, and which, with two others, was given by *M'Call* to his vendor, *David Stanbrough*, curator of the succession of *Jesse Harper*. To secure these notes *M'Call* gave a mortgage, with a covenant *de non alienando*. Notice of the order of seizure and sale was served upon *M'Call*. *Collier* obtained an injunction against the execution of the order of seizure and sale, alleging that he was himself the owner of all the notes, having purchased them at a sale by the marshal of the United States; and also that, *Josiah Stanbrough* had no title to the note, because *David Stanbrough*, the curator of the succession of *Harper*, and who was the payee of the note, had no authority to transfer it. In that controversy there was judgment in favor of *Josiah Stanbrough*, which was affirmed by the Supreme Court of this State, in

\*This opinion was pronounced in March, but suspended by the application for a re-hearing. In March, all the judges were present.

1843; and by the Supreme Court of the United States, in 1848. In that litigation, *Stockton* was the attorney and counsel of *Collier*. See this case as reported in 6 Rob. 433, and 6 Howard, p. 14.

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In 1846, *Stockton* brought a suit, in his individual name, against *David Stanbrough*, curator, in which, after reciting that the curator had possession and claimed the ownership of the two other mortgage notes, and was proceeding upon them by order of seizure and sale, he alleged that he, *Stockton*, had become the owner of the three notes, by assignment from *Collier*, in 1843; that *M'Call* was insolvent, and that the land was his only security for the debt. Upon these allegations *Stockton* obtained an injunction, arresting the execution of the writ of seizure and sale obtained by the curator.

After the final decree, in 1848, by the Supreme Court of the United States in favor of *Josiah Stanbrough*, and before any mandate or decree of the Supreme Court of the State, restoring the jurisdiction of the District court with regard to *Collier's* case, had been recorded in the District court, *Stockton* appeared in the present suit, by third opposition, and presented a new obstacle to the prosecution of the order of seizure and sale, obtained in 1842, and which had been suspended during seven years by the injunction obtained by *Collier*. The grounds alleged in the opposition are, that *Stockton* had become the owner of the mortgaged promises by the purchase from *Compton*, in January, 1847, who purchased from *M'Call* in January, 1842; that the note, upon which the order of seizure and sale was obtained, was extinguished by prescription; and that *David Stanbrough*, curator, had no authority to transfer the note. There was judgment in favor of *Stockton*; and from that judgment the plaintiff prosecutes the present appeal.

From the facts which we have stated it results that, from 1842, down to at least 1848, the plaintiff was judicially restrained from prosecuting his suit; and this restraint, from September, 1843, must be considered the personal act of *Stockton*. For although he acted at first only as the counsel of *Collier* in the injunction obtained by him, *Stockton* became, by the assignment of *Collier*, the real plaintiff in injunction, and must be considered, from the date of the assignment, as the true party who prosecuted the suit in the court below, who took a suspensive appeal to the Supreme Court, and afterwards carried the cause by writ of error to the Supreme Court of the United States. If *Collier* had not arrested the plaintiff in the execution of the order of seizure and sale, and *Stockton*, succeeding to his rights, had not continued this judicial restraint, the plaintiff would, years ago, have obtained a sale of the land and received its proceeds. The question then presents itself whether one, who, under pretence of rights which have been adjudged to be unfounded, has unlawfully used the process of a court of a justice to restrain another in the prosecution of a right, can avail himself of the delay which his own wrong has occasioned to defeat that right? An affirmative answer to this proposition would involve principles shocking to reason and natural justice. It is equally repugnant to authority.

It has been said, in argument, that, in the prescription *liberandi causa*, good faith is not required. As the general rule, this is true. C. C. 3515. The man who knows that he has not paid a debt may plead prescription. In doing so, he offends good conscience; yet the law, acting upon considerations of public policy, forbids the creditor to put him on his oath, and compel him to declare whether the debt has been paid or not. But the rule has its exceptions. Thus, if having confidence in my debtor, I hand him the evidence of my debt, in order that he may attempt to

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collect it from other parties who are also bound to me, and my debtor should take advantage of my confidence and withhold it from me, upon false pretences, until the "délai libératoire" had elapsed, he would not be permitted to escape upon the plea of prescription, because, by his own wrong, he had prevented me from acting. See Nougier, *Des Lettres de Change*, vol. 1, p. 61. See also Troplong, *Prescrip.* § 646.

The rule that, he who thus paralyzes the right of another shall not benefit by his own act to prescribe against that right, is not peculiar to our own jurisprudence; but, as it has its foundation in reason and justice, we find it adopted as a principle of equity in England and in the United States. In *Putney v. Warren*, 6 Vesey, 73, it was held that where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances and for a length of time, which deprives his adversary of his legal rights, the court of equity considers that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party so prosecuting an unfounded claim has deprived his adversary. See the *East India Co. v. Cumpron*, 11, Bligh. 158 &c. *Story's Equity*, vol. 2, 1526.

The appellee questions the validity of the transfer of the note by *David Stanbrough*, curator, to *Jesse Stanbrough*, who endorsed it to the plaintiff, on the ground that it was the property of a succession, and that no judicial authorization for the transfer has been proved. If the transfer was made irregularly, and to the detriment of the creditors or heirs of the succession, the plaintiff would be deemed a trustee for them; but his possession, as holder, would certainly enable him to act, for the purpose of arresting prescription.

In order that the opponent may be protected from any further disturbance by the succession of *Harper*, if he should think proper to pay the debt, and that the proceeds of the mortgaged property, if sold, may go to the party really entitled to them, we will make provision in our decree.

It is decreed that the judgment of the court below, upon the opposition of *Stockton*, be reversed; that the plaintiff have leave to proceed in the execution of the order of seizure and sale; that the proceeds of the sale of the mortgaged property described in the plaintiff's petition be brought by the sheriff into court, for distribution, contradictorily with the succession of *Jesse Harper*, upon due notice given to the proper representative of said succession; and that, if the said *Stockton* desires to pay the amount of the mortgage claim, he may deposit the same in court, subject to the order of the court, to be rendered contradictorily with said succession of *Jesse Harper*. And it is further decreed that, said *Stockton* pay the costs of this appeal; and, that the costs of the opposition in the court below, be paid by the plaintiff.

### SAME CASE—APPLICATION FOR A RE-HEARING.

Where a mortgage contains the pact *de non alienando*, one, who subsequently purchases the property from the mortgagor, cannot claim to be in any better condition than his vendor, nor can he plead any exception which the latter could not. Any alienation in violation of the pact *de non alienando* is null, as to the creditor.

Where a creditor, whose claim is secured by mortgage, may proceed against the same person by a personal action or by executory proceedings, the institution of proceedings *via executiva* will interrupt the prescription running against the personal action; and this interruption is continuous, preserving the personal action while the executory proceedings are

being prosecuted; and *vice versa*. And where the mortgage contains the pact *de non alienando*, a purchaser from the mortgagor, subsequent to the mortgage, will be considered as standing in the place of the mortgagor, and as subject to the same liabilities.

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v.  
M'CALL.

ON an application for a rehearing, made in this case by *Steele*, for the opponent, the judgment of the court (*King*, J. absent,) was pronounced by

SLIDELL, J. An application for a rehearing has been made in this case, in which, among other points presented in his first brief, the appellee particularly insists upon the considerations, that he stands as the vendee of *Compton*, who had no participation in the injunction, and was at no time a party to the proceedings; and that the attempted exercise of the hypothecary right had no effect upon the right of personal action for the debt. The doctrine is invoked that when mortgaged property has passed into the hands of a third person, the interruption of the personal action against the debtor does not interrupt the prescription with regard to the third possessor; and, reciprocally, that the interruption of the hypothecary action does not interrupt the prescription of the principal.

The correctness of the doctrine, in ordinary cases, may be conceded. But the circumstances of the present case, are peculiar. In addition to the professional and personal connection of *Stockton* with this case, during the protracted delay which is now invoked for the purposes of prescription, there is a feature in the case which is decisive against his right to avail himself of his newly acquired character as the vendee of *Compton*, and to treat the personal and hypothecary rights as distinct and independent.

We have already shown that *Stockton* was fully acquainted with the antecedent conveyances and mortgages. They were not only recited in the deed from *Compton*, but in the pleadings in the case; and, indeed, the appellee concedes his entire acquaintance with the titles, and disclaims any benefit which ignorance could confer. Now the mortgage from *M'Call* contains, as stated in our previous opinion, the covenant *de non alienando*. The language is, "hereby confessing judgment in favor of said *J. Stanbrough*, curator as aforesaid, for the said sum of money, to be paid with interest as aforesaid, and covenanting not to dispose of said lands to the prejudice of this mortgage."

The effect of this covenant has been frequently considered, although never, as we believe, with reference to the particular point now under consideration.

In *Nathan v. Lee*, 2 Mart. N. S. 33, it was said that a mortgage creditor, who acts on a mortgage which contains in his favor an agreement of the debtor not to alienate, is not bound to pursue a third possessor by the action of mortgage, but may have the hypothecary property seized, *vid executive*, as if no change had taken place in its possessors; because any alienation or transfer made in violation of the pact *de non alienando* is, *ipso jure*, void, as it relates to the creditor. To consider such a pact as entirely nugatory and unavailing, would be contrary to a fundamental rule in the construction of contracts and statutes—that full effect should be given to all their provisions, whenever it can be done without falling into absurdity. Judge Martin also said in that case that, the effect of the pact *de non alienando* was not impaired by the provisions of the Civ. Code of 1808. The strong language which he uses as to the effect of the pact, is supported by the spanish authority to which he refers. Febrero observes: "En virtud de este pacto es nula la enagenacion, y se contempla la cosa hipotecada en poder del deudor para el fin expuesto, segun queda sentado en el num. 68." And in the section referred to, he says; "Y se previene que contra este no pasa el derecho de executar, aunque proceda de sentencia declarada en coza juzgada, y la obligacion sea personal ò real; excepto

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que intervenga el pacto referido, que entonces como no se transfiere su dominio al tercero poseedor, ya sea por título oneroso ó lucrativo, antes bien es nula la enagenación, se contemplan los bienes enagenados de esta forma como existentes en poder del deudor principal y verdadero, *porque esta por ningún acto, ni contrato puede debilitar, ni deteriorar la condición de su acreedor.*" Febrero, Adicionado, Librería de Escribanos, part 1. ch. 7, §4, nos. 89, 68.

In *Donaldson v. Maurin*, 2 La. 39, the effect of the pact was again considered; the case of *Nathan v. Lee*, was affirmed; and it was also held that its effect was not impaired by the repealing act of 1828. It was considered as springing, not from legislation, but from the agreement of the parties. "It is an universal principle," said the court, "that effect must be given to all the parts of a written contract or agreement, and meaning to all its stipulations and phrases, unless such a construction leads to absurdity." "It is also a general rule that, owners of property must be presumed to know the titles and the encumbrances under which they hold."

In *Murphy v. Jandot*, 2 Rob. 378, the court said: The mortgage to *Jandot* contains the clause *de non alienando*, and consequently no transfer of the property would effect his right to proceed summarily against it, as if still belonging to the mortgagor. So in *The Gas Bank v. Allen*, 4 Rob. 389; *Dodd v. Crain*, 6 Rob. 60. *Ducros v. Fortin*, 8 Rob. 167.

Hence, then, it results that, *Stockton*, holding under *M'Call* and well acquainted with his title, is estopped by the pact *de non alienando* from claiming a better condition than his author, and pleading an exception which *M'Call* could not have pleaded. Let us see then whether, under the circumstances, *M'Call* could assume the grounds which *Stockton* attempts to occupy, and assert that the debt and mortgage were extinguished by prescription.

By the pact *de non alienando*, *M'Call* was forbidden to alienate to the prejudice of the mortgage; the plaintiff was entitled to proceed by seizure and sale, as though he had not sold; and did so proceed, and gave him notice. Can a mortgagor in possession (and, by virtue of the pact, *M'Call* is deemed still in possession,) pretend that prescription runs against the debt itself, while the creditor is exercising the accessory right of mortgage. This question may be answered in the language of D'Argentrée. "Sed de his actionibus quæ se habent esse, ut accessorie et principalis, ut personalis et hypothecaria, justa dubitatio esse posset, nisi expressè de eo esset constitutum, l. fin. C. de Annal. Except., quâ traditur una contestatione aut citatione in alterâ, fieri in utraque interruptionem. Sed etsi in isto est aliquid, tamen in eo non sunt omnia. Nam cum hoc sic statuitur, præsupponitur personalem et hypothecariam adversus eandem personam competere, et idè alteram alteri disjunctam accessoria ex causâ debiti eadem, et si diversæ qualitatis obligationes sunt. Secus accidit, cum personalis in personâ obligati aut hæredum resedit, et hypotheca in extraneum est translata, quo casu dubium non est, utramque per principalem esse; unde evenit, ut prescriptionis tempora non sint eadem. Ideoque apparet mutatione personæ mutari prescriptionum condiciones et extraneum de facta suo non teneri, sed in rem persecutionem esse, et quæ adversus eum actio interdatur, non esse amplius accessariam ad personalem. Quare hoc casu censeo quod interruptum fuerit adversus principalem, extraneo non obesse, cujus aliud jus et causa est et posse ex capite suo prescriptionem perficere." Art. 266, p. 1160, no. 9; cited in *Troplong*, Prescrip. note to no. 659.

Applying these principles to the case before us, the prescription of the personal

action was interrupted by the hypothecary proceeding, the creditor being competent to exercise both of these against the same person, by virtue of the pact *de non alienando*. STANBROUGH  
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This reasonable rule is sanctioned by the Code, from which, as we have seen, D'Argentrée derived it. "Qui obnoxium suum in iudicium clamaverit, et libellum conventiomis ei transmiserit, licet generaliter nullius causæ mentionem habentem, vel unius quidem specialiter, tantummodo autem personales actiones, vel hypothecarias continentem, nihilominus videri jus suum omne eum in iudicium deduxisse, et esse interrupta temporum curicula: cum contra desides homines et sui juris contemptores odiosæ exceptiones oppositæ sunt." Code, lib. 7. tit. 40.

The rule harmonizes with the theory of prescription, which has its basis in the presumption of renunciation on the part of him who neglects his rights, and which presumption cannot be entertained against a party who is struggling to collect a debt, and is not *sui juris contemptor*.

The interruption then created by the institution of one species of action must also be considered as continuous, and as preserving the personal action while the hypothecary action is in course of prosecution. To this effect is the language of *Dunod*, who, while he sanctions the general rule invoked by the appellee, recognizes the exception in a case like the present. L' action personnelle intentée contre le débiteur, n'empêche pas le tiers possesseur de l'hypothèque de la prescrire; et vicissim, quoique l'exercice de l'une conserve l'autre lorsqu'elles concourent dans un même sujet; parcequ'en ce dernier cas elles sont jointes et accessoiries l'une à l'autre, au lien qu'au précédent elles sont principales et indépendantes.

*Rehearing refused.*

### STANBROUGH, Curator v. M'CALL.

Decision in *Stanbrough v. M'Call*, ante p. 324, as to prescription, affirmed.

**A**PPPEAL from the District Court of Madison, *Selby, J. Bemiss*, for the plaintiff. *Thomas, Snyder, Stockton and Steel*, for the defendant and third opponent, appellant. The judgment of the court\* was pronounced by

**SLIDELL, J.** The plaintiff obtained, in July, 1846, an order of seizure and sale upon the two last of the three notes mentioned in the case of *Josiah Stanbrough* against *M'Call*, ante p. 324. These notes fell due in 1843 and 1844. In August, 1846, *Stockton* enjoined the execution of the order of seizure and sale, alleging ownership of the entire series of notes, by assignment from *Collier*. In October, 1846, judgment was rendered dissolving the injunction; and from that judgment *Stockton* took a suspensive appeal to this court, whose decree, affirming the injunction, became final in 1848. See 3 An. p. 390. It does not appear that the decree of the Supreme Court has yet been recorded in the court below.

In April, 1848, while the execution of the order of seizure and sale was thus suspended by the action of *Stockton*, he interposed a new obstacle to the prose-

\*This opinion was delivered in March; but as it refers to the case of *Josiah Stanbrough v. M'Call*, ante p. 324, which was suspended by a re-hearing, and in which a second opinion was pronounced at this date, the present case has been deferred until that of *Josiah Stanbrough* could be reached in order of time.

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cution of the plaintiff's proceedings, alleging, as a third opponent, that he had bought the mortgaged premises, in 1847, from *Compton*, who had bought them from *M'Call*, the mortgagor; that the two first of the three notes were extinguished by prescription; and that the hypothecary right of the plaintiff had ceased to exist. For a more minute recital of the facts we refer to the case above mentioned, *ante* p. 324. There was judgment upon the third opposition in favor of the plaintiff, and *Stockton* has appealed.

For the reasons assigned in the case of *Josiah Stanbrough v. M'Call*, we are of opinion that the prescription, which was not complete when the order of seizure and sale was obtained, was suspended during the judicial restraint provoked by *Stockton* himself.

*Judgment affirmed.*

### THE FIRST MUNICIPALITY v. MANUEL.

The ordinance of the General Council of the First Municipality of New Orleans, of 28 Nov., 1843, imposing a tax on all retailers of soda-water, with the exception of apothecaries, is not illegal nor unconstitutional; nor will the fact that the party had paid for a license as a confectioner, exempt him from liability for the tax.

**A**PPEAL from the decision of a justice of the peace in New Orleans. The appellant resisted payment of the tax on the grounds: 1st. That it was illegal and unconstitutional. 2d. That having obtained a license as a confectioner, he could not be subjected to another tax for retailing soda-water, or any other article in the line of his business.

*Preaux* and *Morel*, for the plaintiffs. *Schmidt*, for the appellant; cited Const. art. 127. The judgment of the court (*King*, J. absent,) was pronounced by

*EUSTIS*, C. J. This is an appeal taken from a judgment of a justice of the peace of New Orleans, by which the amount of a tax, and the price of a license, were adjudged to be due by the defendant, by virtue of an ordinance of the General Council of New Orleans, imposing said tax on the retailers of soda-water in the city, with the exception of apothecaries.

We think this ordinance is not illegal, but is warranted by a fair construction of the act of the 12th of January, 1842, entitled "An act explanatory of the powers of the General Council of the city of New Orleans."

*Judgment affirmed.*

### Soubiran v. Rivollet.

Where it is shown that the succession of a deceased husband would not have defrayed the expenses of its administration; and that he died in a state of absolute destitution; his surviving wife cannot be made responsible for any portion of his debts, under art. 2387 C. C., on proof that she took possession of certain old trunks and their contents, which the evidence renders it highly probable contained nothing but papers and old clothes, which she offered to return. *Per Curiam*: If the succession could not have defrayed the expense of its administration; she was not bound to have it administered.

**A**PPEAL from the Second District Court of New Orleans, *Canon, J. Duvigneaud*, for the appellant, cited C. C. 1074, 2381, Bul. & Cur. Dig. p. 810. *Chabot, des Successions*, vol. 2 p. 108. *Dict. du Droit Civil*, vol. 6, p. 56, arts. 28, 29, 35, 38. *Ibid.* vol. 2, p. 225, arts. 563 to 573. *Biron*, on the same side. *Latour*, for the defendant. The judgment of the court (*King, J. absent*), was pronounced by

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*Rost, J.* The plaintiff, who is a creditor of the late *Jean Marie Rivollet*, seeks to make his widow responsible for the debt, under art. 2387 C. C. The answer contains a general denial, and averment that the defendant has neither concealed nor made away with any of the effects of the community; but that, after the death of her husband, as a conservatory measure, and in the presence of witnesses, she took possession of two old trunks and their contents, which she is ready to deliver to any person authorized to receive the same. The District court non-suited the plaintiff, and he has appealed.

The allegations that the defendant has concealed or made away with the effects of the succession, are entirely unsupported by evidence. It is proved, on the other hand, that *Rivollet* lived separate from his wife, and was, at the time of his death, in a state of absolute destitution. His brother had to pay his funeral expenses, and the person, in whose house he lived, has against him a claim for rent and attendance, which she considers as lost. This testimony makes it highly probable that the two trunks, of which the defendant took charge, contained nothing but the papers and old clothes which she offers to return. If, as we believe, the succession would not have defrayed the expenses of administration, the defendant was not bound to have it administered.

*Judgment affirmed.*

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#### FLORANCE v. NOLAN et al.

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Where a debtor is insolvent to the knowledge of his creditor, who receives from him, in payment of an antecedent debt, goods upon which he has no privilege as vendor, the preference is an illegal one. C. C. 1965 to 1989.

**A**PPEAL from the Fourth District Court of New Orleans, *Stratobridge, J. Benjamin and Micou*, for the plaintiff. *Preston*, for the appellant, *Opdyke*. The judgment of the court (*King, J. absent*), was pronounced by

*SLIDELL, J.* It is unnecessary to decide the question presented by the appellant, whether the landlord had a privilege, upon the goods removed by purchasers, for rent not due at the time of removal.

The action does not rest simply upon the assertion of a privilege, but is also a revocatory action under the provisions of art. 1965 *et seq.* of the Code. It is satisfactorily proved that *Nolan* was insolvent, to the knowledge of the appellant; and, although there may have been no moral fraud, the receiving of that portion of the goods upon which the appellants had not the vendor's privilege, in payment of an antecedent debt, was an illegal preference.

*Judgment affirmed.*



## JOUANNEAU, Curator, v. SHANNON.

Though, in a contest between two joint owners of a steamer as to the extent of their respective interests, the enrollment, which states merely that the two are sole owners, will raise a presumption, under art. 2836 C. C., that the joint ownership was equal, it may be rebutted by the production of the books and papers of the steamer, which, under the circumstances, are equivalent to a written title in favor of the defendant: and parol evidence of their contents, unless specially objected to as secondary, must receive the same consideration as the books and papers themselves.

A part owner of a steamer or vessel, who owns more than half of the vessel, and is in possession, has an undoubted right to employ her in her usual trade, where no objection is made by his co-proprietor. It is only where the owners disagree, that there is any conflict in the jurisprudence of maritime nations on this subject. Nor will this right of employment cease by the death of the co-proprietor, his rights and obligations being transmitted to his heirs.

Where one of the part owners of a steamer, in the exercise of his legal rights, continues the steamer in her usual trade, after the death of his co-proprietor, without objection on the part of the heirs or representatives of the deceased, any loss resulting from an explosion of her boilers must be borne by the co-proprietors in proportion to their respective interests, unless it be shown to have resulted from the negligence or misconduct of the surviving part owner. And where, in such a case, the share of the survivor is purchased by a third person after the explosion, who causes the repairs necessary to render the boat fit for navigation to be made in a prudent manner and in good faith, without objection on the part of the heirs or representatives of the deceased, and the repairs are proved to have increased the value of the boat more than their cost, the share of the deceased must, as between the succession itself and the purchaser, be charged with its proportional part of the cost of the repairs.

**A** PPEAL from the Second District Court of New Orleans, *Canon, J. Redmond and Cohen*, for the plaintiff. *Goold and Kendall*, for the appellants. The judgment of the court (*King, J. absent*), was pronounced by

**SLIDELL, J.** *Miller and Whipple* owned the steambot Medora. *Whipple* died in New Orleans, in January, 1847: his succession was opened here; and, after some delay, *Jouanneau* was appointed curator. In February, 1847, while making her second trip after *Whipple's* death, an explosion of her boilers took place, by which she was much injured. *Miller* then sold his interest, of three-fourths, to the defendant, who repaired and put her in running order. In April, the curator brought this suit, in which he claims one-half of the boat. *Shannon* answered claiming three-fourths, and asking to be allowed the sums he had expended for necessary repairs.

The first point which requires consideration is, the extent of ownership of the parties. The enrollment, which was made in 1846 upon the oath of *Miller*, states that he, together with *Whipple*, are sole owners of the Medora. To prove that *Whipple's* interest was only a fourth, the defendant offered the testimony of the steamer's clerk, who deposes that he kept her books: that *Miller* appeared on the books as owner of three-fourths, which he afterwards sold to *Shannon*; that *Whipple*, who acted as the boat's engineer, owned one-fourth, as also appeared on the books; that he never claimed a larger interest, and, in all his settlements of account with the boat, acted on the basis of an interest of one-fourth.

The plaintiff objected to this testimony, on the ground, "that the enrollment, introduced in evidence by plaintiff, having established the joint ownership of the

steamboat by plaintiff and defendant, and the law (C. C. 2836) raising in plaintiff's favor the presumption that said joint ownership was equal, the title of defendant to a greater portion of such boat could only be established by an instrument in writing, inasmuch as plaintiff established his interest by evidence of that character,"—which objection the court overruled, and the plaintiff took his bill of exceptions.

The ruling of the court does not appear to us erroneous. It may be conceded that, the analogy of the article of the Code referred to justifies the presumption invoked by the plaintiff. It declares that "when the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses." But, while the enrollment fairly raises that presumption, it is not a presumption *juris et de jure*. It is merely a presumption supplied, in the silence of the parties, upon the principle that equality is equity, and that an equitable standard will be applied where the parties had not expressly furnished one. The burden was thrown upon *Shannon* to rebut the legal inference, and we think he has done so successfully.

It will be observed that no objection was made to the non-production of the books and accounts, nor to the parol proof of their contents. The books and accounts, under the circumstances, were equivalent to a written title in favor of the defendant: and parol proof of their contents, unless specifically objected to, as being secondary evidence, must receive the same consideration as the books themselves.

Concurring in opinion with the district judge that, *Whipple* owned only one-fourth of the steamer, our next enquiry will be directed to the conduct of *Shannon* after *Whipple's* death, and its legal consequences.

The right of a part owner in possession, who owns the preponderating share of a vessel, to employ her in her usual trade, where no objection is made by his co-proprietor, appears to be undoubted. It is only in the case where the owners disagree, that we find any conflict in the jurisprudence of maritime nations. The laws of France, the ordinances of the Hanse towns, those of Wisbuy, and generally the ancient usages, are said to authorize the exercise of a complete authority by the majority in interest. The English law qualifies this authority. It authorizes the majority in interest to employ the ship, yet, at the same time, protects the interests of the dissentient minority from being lost in any employment which they disapprove, by requiring the majority to give security for the vessel's safe return. Differing upon a minor point, the laws of all commercial nations harmonize to this extent, that they are founded upon equitable principles and an enlarged public policy. In the language of a learned author, "ships are built to plough the sea and not to lie by the walls, and their actual employment is considered as a matter not merely of private advantage to their owners, but of public benefit to the State; and therefore rules have been adopted to favor this employment, and to prevent the obstinacy of some of the part owners from condemning the ship to rot in idleness." *Abbott on Ship.*, p. 125.

In a liberal furtherance of those principles it has been held that, if the dissenting part owner does not apply for security, he is supposed to consent to the employment of the ship, is liable for his share of the expenses, and entitled to a share in the profits. *Gould v. Stanton*, 16 Conn. 12, cited in notes to *Abbott*, edit. of 1846.

We have not found in the books any case where the question of the right of employment, after the death of a part owner, has occurred. But, upon

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principle, we conceive the cases are not distinguishable. The rights and the obligations of a party are transmitted to his heirs. *Whipple*, when he assented to become a part owner with *Miller*, assumed all the obligations and liabilities which pertained by legal implication to that relation. If *Miller* choose to send the steamer on a voyage, and *Whipple* did not object, the vessel and the voyage were not at *Miller's* sole risk. If *Whipple* objected, his remedy was by application to a competent tribunal to compel his associate to give security. With what propriety can the character of the contract, and the reciprocal rights and duties of the parties, be immediately changed by the transmission of the interest of *Whipple* to his heirs? Public policy, and the interest of *Miller*, who was the owner of three-fourths of the vessel, still required that she should not lie idle at the wharf, but be usefully employed.

The peculiar circumstances presented in this case illustrate very strongly the propriety of maintaining the principles above explained, even after the death of the partowner. The steamer had been advertised to leave, on her usual voyage, on the day of *Whipple's* death. She was a regular packet, had been taking in cargo on the day of his death and the day previous, and was heavily laden. If the argument of the plaintiff's counsel be correct, and *Whipple's* death terminated the controlling power of the majority interest, the steamer should not only have withdrawn from all future business, but have disappointed passengers already engaged, and disembarked the freight she had already received. Such a proposition certainly involves an injustice to *Whipple's* co-proprietor, and a disregard of the interests of commerce.

It is proper also to add that, the boat made only two trips after the part owner's death, and these were in her regular trade as a packet.

Being therefore of opinion that the continuance of the boat's employment, in the absence of any objection by the proper representative of the succession, was not illegal, the solution of the question arising out of the explosion, which occurred on her second trip after *Whipple's* death, is free from difficulty. *Miller* having a right to employ the boat usefully, he is not to bear the whole burden of that loss, unless it can be attributed to some fault on his part. Under the evidence, it is doubtful whether the accident arose from some defect in the boilers, or from the inattention of the engineer. But there is nothing proved which would authorize us to say that the loss was attributable to any misconduct or negligence on the part of *Miller*, either in the selection of an engineer or otherwise. If the same thing had happened in *Whipple's* life time, under similar circumstances, there would be no pretence for inflicting the whole loss on his associate.

The explosion injured the boat so seriously that she would have been entirely unfit for navigation without repairs. *Shannon*, who bought *Miller's* interest, had these repairs made in a prudent manner and in good faith; and the claim for these repairs, having been submitted by order of the court below to skilful experts, has been ascertained to be reasonable. The outlay was \$3,973 66; and, in the opinion of the experts, has increased the value of the vessel in a greater ratio.

As these repairs were necessary and reasonable, and have contributed to the common benefit, and as there is no evidence of any objection by the representative of the succession to their being made, it would be inequitable to enrich the succession at the expense of *Shannon*.

Even if the part owners are not to be treated, *inter se*, as commercial partners,

under article 2796 of the Code, they are at least to be considered as quasi partners, and accountable for the excess which one, in good faith, has advanced for the other. As between the succession of *Whipple* and the defendant, we entertain no doubt that the share of the former in the proceeds of the boat, should be charged, in favor of *Shannon*, with one-fourth of the amount of \$3,973 66, expended for the repairs. *Gardner v. Cleveland*, 9 Pick. 336.

It may be, however, that the succession is not solvent; and we think it proper not to express an opinion now as to the right of *Shannon* adversely to creditors of the estate, but will leave that question to be settled upon a tableau of distribution.

It is therefore decreed that, the judgment of the court below be reversed. It is further decreed that, the said *Shannon* be recognized as the owner of three fourths of the steamer *Medora*, and, as such, that he receive three fourths of the proceeds of the sale of said steamer. It is further decreed, that the said succession be recognized as the owner of one-fourth of said steamer; that the said succession be adjudged the debtor of the said *Shannon* in the sum of \$993 41½; and that the right of *Shannon* to be paid said sum, by preference out of the share of said succession in said proceeds of sale, be reserved for adjudication upon the tableau of distribution, said share of said proceeds to be considered as representing the share of the said succession in the said vessel. And it is further decreed that, the costs of this appeal be paid by the succession; and that the costs of this suit in the court below be paid by the said succession, and the said *Shannon*, in equal portions.

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### HEWLETT v. HENDERSON.

Where, on an application for a new trial on the ground of the sickness of one of the plaintiff's counsel and the absence of the other on professional business elsewhere, there is no allegation that the judgment is contrary to law and evidence, nor that justice requires its revision, a new trial must be refused.

**A**PPEAL from a judgment rendered by the District Court of Jefferson. *Clarke, J.* refusing a new trial. The reasons assigned for the refusal were:

"In this case, a judgment of non-suit having been rendered, the plaintiff moves for a new trial, on the following grounds: 1st. That the principal counsel was unable to attend the trial, on account of important professional business elsewhere. 2d. That another counsel was also unable to attend on account of sickness. 3d. That the counsel representing the attorneys of plaintiff moved for a continuance on the grounds stated, and, pending the motion, which was very much protracted by defendant's counsel, he was obliged to leave the court, to attend a criminal case at Carrollton.

"The application sets forth none of the grounds indicated in our Code of Practice as legal causes for granting a new trial. Vide C. P. 560. There is no allegation that the judgment is contrary to law and evidence, nor is there a ground laid for the exercise of its discretion by the court in granting a new trial *ex officio*, by the averment, supported by affidavit, that justice requires a revision of the judgment &c. The third ground does not strengthen the application. The statement of facts on which it is based requires some amendment, to make it conform with what transpired on the trial. The counsel who, it is said, represented the

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attorneys of the plaintiff, appeared for the plaintiff when the case was called, and moved for a continuance, upon affidavit of the absence of one, and the sickness of another, counsel. The continuance was refused on the ground that, the affidavit did not set forth facts and contain allegations furnishing legal cause for granting a continuance. Upon the refusal to postpone the trial, having requested the witnesses for the plaintiff to be called, he again moved for a continuance on the ground that one of plaintiff's witnesses, subpoenaed, had not appeared, and, being a member of the legislature, could not be attached. The defendant's counsel opposed the continuance, offering to guaranty the production of the witness in time to give his testimony on the trial. Pending the argument of the question thus raised, the witness appeared in court. Upon the appearance in court of the witness whose absence had been complained of, the counsel who moved for the continuance retired from the court-house, and, there being no one to represent the plaintiff, a judgment of non-suit was entered upon the record. Under the circumstances thus presented, the court is reluctant to entertain an application to set aside a judgment not alleged to be contrary to law and evidence, nor shown to work an irreparable injury or injustice."

*Michel and Soulé*, for the appellant. *Hiestand*, for the defendant. The judgment of the court (*King*, J. absent,) was pronounced by

SLIDELL, J. For the reasons assigned by the district judge, it is ordered that the judgment of the District court be affirmed, with costs.

### LANDREAUX v. MARSOUDET.

Where a recorder of mortgages, who, on the authority and at the instance of the administrator of a succession, illegally cancelled a mortgage, is compelled by a judgment to pay the amount of the mortgage, with interest and the costs of the suit instituted by the mortgagee, he may recover, against the administrator individually, the amount so paid, with interest from judicial demand, and costs of suit.

Admitting the right of an administrator, who has been condemned individually to refund to a register of mortgages an amount recovered from the latter by a mortgagee whose mortgage had been illegally erased at the instance of the administrator, to recover from the creditors of the succession to whom the amount of the mortgage had been paid, which is not conceded, the action against the creditors would be prescribed, under art. 1176 C. C., by three years from the date of the order or judgment under which the payment was made to them.

Interest may be allowed by way of damages.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan*, J. *Le Gardeur*, for the plaintiff. *Marsoudet*, appellant, *pro se*. *Maurian*, on the same side. The judgment of the court (*King*, J. absent,) was pronounced by

EUSTIS, C. J. On the 20th January, 1847, *Pierre Chigé* recovered judgment, in the Fifth District Court of New Orleans, against *Pierre Landreaux*, who was the recorder of mortgages for the city of New Orleans, for the sum of \$1,279 14, with interest from judicial demand, and costs of suit; which judgment was affirmed by this court. See 2 An. p. 606.

The plaintiff, *Chigé*, had purchased certain real estate in New Orleans, at a judicial sale made for the purpose of effecting a partition among heirs. The purchase money was to remain in deposit, in consequence of the existence of a mortgage in favor of the Bank of Louisiana. This deposit was withdrawn without the privity of the purchaser, and an administrator who was appointed to administer the effects of the succession, after the sale to *Chigé*, undertook to raise

the mortgage which existed in favor of the Bank of Louisiana, and, at his instance, the mortgage was cancelled accordingly, on the records of the mortgage office. The Bank of Louisiana took no part in these proceedings, and an order of seizure was issued to subject the property purchased by *Chigé* to the mortgage as still subsisting, and *Chigé*, after an unsuccessful attempt to resist the bank, was compelled again to pay for the property he had purchased, to the extent of the mortgage debt of the bank. He brought his action against the recorder of mortgages for having thus illegally cancelled the mortgage, and thus enabled the administrator to withdraw the purchase money deposited, and apply it to other purposes than that for which it was intended. *Landreaux*, the plaintiff, having paid this judgment, has instituted the present suit against the defendant, who was the administrator, who took upon himself to raise the mortgage in favor of the Bank of Louisiana. In this suit he seeks to recover the amount of the said judgment and costs, and the sum of \$500, for expenses and damages. He obtained judgment against the defendant for the sum of \$1442 95, with interest from the judicial demand, and costs: and the defendant has appealed. The case has been argued in a written brief, presented by the defendant in person. He has failed to show any fact or circumstance by which he was justified in raising the mortgage in favor of the Bank of Louisiana. *Williams v. Bank of Louisiana*, 17 La. 382. *Bertoli v. Citizens' Bank*, 1 An. p. 119. *Gas Bank v. Webb*, 2 An. 526. *Alling v. Citizens' Bank*, ante 308.

It was on his authority and at his instance, that the recorder cancelled the mortgage on his records, by reason of which he was rendered liable to *Chigé* in the action which we have stated, and the defendant must stand responsible to *Landreaux* for having done this act. It is true that the judgment against *Landreaux*, was rendered on admissions of fact made by *Landreaux*, and that those admissions are not binding upon the present defendant. But the facts in this case, as we understand them, and as the district judge in his opinion considered them, are as strong against the defendant as the admission made in the suit by the plaintiff; and the present action, as it stands before us, is without any defence on the merits.

The defendant called in warranty two of the creditors of the succession, to whom, it was alleged by him, that the funds deposited by *Chigé* had been distributed. The district judge held that the recourse of the defendant against these parties was prescribed by lapse of time, by virtue of art. 1176 of the Civil Code. Admitting the defendant to have had any right of action against the creditors, in a case of this kind, which is not conceded, we think the prescription established by this article applies to it. The objections made to the precise amount of the judgment have been examined. The district judge has allowed the plaintiff the amount of *Chigé's* judgment paid by him, with interest and costs, and has given him interest from judicial demand. Interest may be allowed by way of damages, and the amount embraced by the objections of the defendant will be but a small compensation for the expense and damage resulting from the facts of which we have evidence before us.

*Judgment affirmed.*

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### THE FIRST MUNICIPALITY v. CUTTING.

It is no objection to the validity of an ordinance of one of the municipalities of New

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Orleans, containing a prohibition and attaching a penalty to its violation, that it purports by its terms to be a resolution.

Decision in *First Municipality v. Devron*, ante, p. 278 affirmed.

The right to establish markets is a branch of the sovereign power, and that of regulating them is necessarily a power of municipal police.

The rigid rules by which the validity of penal statutes is to be tested, are inapplicable to the by-laws of a municipal corporation.

The fines which a municipal corporation is authorized to recover for the violation of its ordinances is a penalty in the nature of liquidated damages, and established, as such, in lieu of the damages which a court would be authorized to assess in place thereof.

A by-law, or ordinance of a municipal corporation, must be consonant with the law of the land; but it must receive a reasonable construction, and its terms must not be strictly scrutinized for the purpose of making it void.

**A**PPPEAL from a judgment of a Justice of the Peace in New Orleans. *Preaux and Morel*, for the plaintiffs. *Latour and Roselius*, for the appellant. The judgment of the court (King, J. absent,) was pronounced by

EUSTIS, C. J. This is an appeal from a judgment of one of the justices of the peace of New Orleans, rendered against the defendant for the amount of a fine incurred by him, for a violation of one of the ordinances of the First Municipality. The ordinance is in these words: "*Resolved*, that after the promulgation of this resolution, any person selling groceries at the markets shall pay a fine from twenty-five to fifty dollars, for each and every time he shall violate the ordinance forbidding to sell groceries under the meat and vegetable markets." The ordinance to which this refers provides that, "from and after the 1st of January, 1846, it shall not be lawful to sell groceries and oysters, either at the meat or at the vegetable markets."

The first and most material objection which has been taken to the validity of this ordinance or by-law is, that it purports by its terms to be a resolution, and as such has not the force and effect of a legal ordinance or by-law. We considered this objection in the case of *The First Municipality v. Devron*, recently decided, and it was not without difficulty that we came to the conclusion in favor of its legality. That conclusion was founded on the indefinite character of the powers given to the mayor and city council of the late city of New Orleans, by the several statutes on that subject. No form in which their legislative acts are to be exercised is given in any of the statutes. They have authority to make and pass by-laws or ordinances, and, in one instance, fines imposed by the *regulations* and by-laws of the corporation, are recognized as valid. Moreau's Digest, vol. 2. p. 124. In another instance, provision is made for the recovery of fines incurred for offences committed against the ordinances and regulations enacted by the city council. Considering therefore that the ordinance contained a prohibition with the penalty attached, it was in fact a by-law or *regulation*, and the form made use of in enacting it did not render it void as such. It was signed by the mayor, and no valid objection was made to the power of the council to enact it.

It is contended that the corporation has no right to prohibit the sale of groceries in the public markets. The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police. See Blackstone's Com. vol. p. 274. Domat, Droit Public, lib. 1. sect. 3. This power is vested by positive law in the mayor and council of each municipality, upon whom rests the responsibility of the peace, comfort and order of the assemblages collected at fixed hours at these great thoroughfares; The limitation of the sales to perishable objects necessary for the daily support

of the inhabitants, and the exclusion of other articles appear to us to be obviously within the powers vested in the municipal administration. *Morano v. The Mayor*, 2 La. 218.

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It is next contended that the resolution is illegal, because it refers to an ordinance forbidding the sale of groceries in the two markets, without stating what ordinance; and no such ordinance has been shown. The ordinance referred to we have recited at length; it prohibits the sale of groceries and oysters.

If the ordinance under consideration were a penal statute, the penalty might not be enforced by reason of its want of certainty; but we do not understand that the strict and rigid rules by which the validity of penal statutes is to be tested, are to be applied to the by-laws of a municipal corporation. The by-laws of very few of these corporations could stand such a test. *Loze v. The Mayor of New Orleans*, 2 La. 427.

We understand the fine which a municipal corporation is authorized to recover for the violation of its ordinances to be a penalty in the nature of liquidated damages, and established as such in lieu of the damages which a court would be authorized to assess. Willcock on Municipal Corporations, no. 368. A by-law must be consonant with the law of the land; but it must receive a reasonable construction, and its terms must not be strictly scrutinized for the purpose of making it void. *Idem*. no. 382.

The sense of the ordinance in question being plain and obvious to the most common understanding, we do not think it void by reason of uncertainty.

*Judgment affirmed.\**

### SUCCESSION OF MOSSY.

A marriage contract stipulated: "Art. 1. *Les futurs époux seront uns et communs en tous biens, meubles et immeubles, acquis et conquis immeubles, qu'ils peuvent maintenant posséder, ou pourront posséder à l'avenir, &c.* Art. 3. *Les biens de la demoiselle future consistent: 1°. en une somme de six cents piastres, provenant d'une donation qui lui fut faite par Mr. J. A. et Mme. D. son épouse, grand-père et grande-mère de la demoiselle future; 2°. et en son trousseau de la valeur de mille piastres, ainsi que le reconnaît le sieur futur qui consent d'en demeurer chargé par le seul fait du mariage.* Art. 4. *Les sieur et Dame A., père et mère de la demoiselle future, constituent en dot, conjointement et par moitié en avancement de leurs successions futures, à Mlle. A., leur fille, qui l'accepte, et dont le sieur futur se fait charge, payée qu'elle soit: 1°. une somme de six mille piastres qu'ils s'obligent et promettent de payer aux futurs époux, savoir: trois mille piastres dans le courant du mois de juillet de l'année prochaine, et trois mille piastres dans le courant du mois de juillet de l'année prochaine, mil huit cent vingt neuf; 2°. et douze couverts d'argent, &c. estimés par les parties à la somme de cent vingt piastres, le tout.* Art. 5. *Tous les biens ci-dessus constatés entreront dans la communauté sus-établie et en feront partie à compter du jour de la bénédiction nuptiale; et tous les autres biens qui pourront échoir et appartenir par la suite aux futurs époux, soit par succession, donations, legs ou autres avantages quelconques, seront et demeureront propres à chacun d'eux, de côté et ligne."* Held: That the property brought into the community was that owned by the parties at the date of the marriage contract; that the property which the future wife owned at that time, consisted only of that described in art. 3; that the dowry settled on her by her parents, and to be paid in one and two years, was not her property until after the marriage (C. C. 1733); and that the provision in art. 5, that all the previously enumerated property shall fall into the community, refers exclusively to the property enumerated in the third article, which must be considered as part of the community.

\*A similar decision, for the same reasons, was rendered at the same time, in the case of the *First Municipality v. Vogel*.



SUCCESSION  
OF  
MOSSY.

**A**PPEAL from the Second District Court of New Orleans, *Buchanan, J. presiding. LeGardeur*, for the appellant. *S. L. Johnson*, for the under-tutor, *contrd.* The judgment of the court (*King, J. absent.*) was pronounced by

*Rost, J.* The mother and natural tutrix of the minor children of the late *Toussaint Mossy*, applied to the court for leave to substitute a special mortgage to the legal mortgage existing on her property in their favor, and filed an account liquidating their rights, in which she deducts from the assets of the community the sum of \$7,720, brought by her in marriage. She prayed for its homologation. This prayer was opposed by the under-tutor of the minors, upon the ground that, by the marriage contract between the deceased and his wife, the property brought by the latter in marriage became a part of the community, and that the whole assets ought to be equally divided between the tutrix and her children. This appeal is taken from the judgment of the District court sustaining that opposition.

This case turns upon the correct interpretation of the following articles of the marriage contract :

Art. 1. Les futur époux seront uns et communs en tous biens, meubles et immeubles, acquêts et conquêts immeubles, qu'ils *peuvent maintenant posséder*, ou pourront posséder à l'avenir, &c.

Art. 3. *Les biens de la demoiselle future consistent* : 1°. en une somme de six cents piastres, provenant d'une donation qui lui fut faite par *Mr. Jean Marie Armant et Mme. Félicité Dupin*, son épouse, grand-père et grand-mère de la demoiselle future; 2°. et en son trousseau de la valeur de mille piastres, ainsi que le reconnaît le sieur futur, qui consent d'en *demeurer chargé par le seul fait du mariage.*"

Art. 4. Les sieur et dame *Armant*, père et mère de la demoiselle future, *constituent en dot*, conjointement et par moitié, en avancement de leurs successions futures, à *Melle. Jeanne Eliza Armant*, leur fille, qu'il' accepte, et *dont le sieur futur se fait charge*, payée qu'elle soit : 1°. une somme de six mille piastres qu'ils s'obligent et promettent de payer aux futurs époux, savoir : trois mille piastres dans le courant du mois de juillet prochain, et trois mille piastres dans le courant du mois de juillet de l'année prochaine, mil huit cent vingt neuf; 2°. et douze couverts d'argent, cuillères à soupe et à ragoût, aussi d'argent, estimés par les parties à la somme de cent vingt piastres, le tout.

The fifth article then provides that : Tous les biens ci-dessus constatés entreront dans la communauté sus-établie, et en feront partie à compter du jour de la bénédiction nuptiale; et tous les autres biens qui pourront échoir et appartenir par la suite aux futurs époux, soit par succession, donations, legs ou autres avantages quelconques, seront et demeureront propres à chacun d'eux, de côté et ligne."

We consider that the property brought into the community by the parties was that, which they owned at the date of the marriage contract. The property which the appellant possessed and owned at that time, consisted only of the property described in the third article of the contract. The dowry settled upon her by her parents, and to be paid in one and two years, was not her property until after the marriage had taken place. C. C. 1733.

The fifth article provides that, all the property previously enumerated shall fall into the community. This, we conceive, refers exclusively to the property enumerated in the third article. Any other interpretation would lead to the absurd result of throwing into the community a sum of money given to the wife, on

the express condition that it should be dotal, and which the husband has acknowledged to have received as such.

Under the decision of the Supreme Court, in the case of *Fabre et al. v. Sparks*, 12 Rob. 31, the property described in the third article of the contract must be considered as part of the assets of the community. But the appellant is entitled to deduct from the total amount of those assets her dowry, amounting to \$6,120.

It is, therefore, ordered that the judgment in this case be reversed. It is further ordered that the opposition of the under-tutor be sustained, for the sum of \$1,600, mentioned in the third article of the marriage contract between the tutrix and her husband. It is further ordered that the remainder of the opposition be overruled, and that the account of tutorship be rendered in conformity with this opinion; the costs of the opposition to be paid by the tutrix, and those of this appeal by the minors.

SUCCESSION  
OF  
MOSEY.

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### WILTZ et al. v. PETERS et al.

Where certain stockholders of a bank, who had been appointed commissioners of an election for directors, and whose duty it was to ascertain the legality of any disputed votes, receive certain votes though objected to when offered, and sign, on the day of election, a certificate from which it appears that certain individuals obtained the plurality of votes necessary to an election, they will not be allowed to urge, in an action to annul the election, that any portion of the votes so received by them were not given according to law, nor that they were given by persons not *bonâ fide* owners of the shares on which they voted. *Per Curiam*: Though, under our legislation, any stockholder has a right to enquire, by a *quo warranto*, into the election of those who assume to administer the corporation of which he is a member, a stockholder may have so acted as to render himself incompetent or disqualified to become a relator. Where the wrong complained of was the result of his own misconduct or neglect, or he has acquiesced or concurred in it, he will not be listened to. And although a corporator will not be permitted to impeach a title conferred by an election over which he presided, or the legality of the votes which he himself, as commissioner, received, nor to contest an election in which he has concurred; yet, if one should concur in an election in ignorance of some fact making it invalid, and should afterwards show the objection, and that it has come to his knowledge since the election, he should be heard, consent, induced by error, not being binding in the eye of the law. Without undertaking to say to what extent these principles apply to municipal corporations, we have no hesitation in recognizing their application to private corporations.

**A** PPEAL from the Second District Court of New Orleans, *Canon J. Prentiss* and *L. Peirce* for the plaintiffs. *Hunt, Grymes, Lockett and Gould*, for the appellants. The judgement of the court, (King, J. absent,) was pronounced by *SLIDELL, J.* The petitioners seek by the present proceeding, which is in the nature of a *quo warranto*, to oust the defendants, *Peters* and others, from the directorship of the Louisiana State Bank. They also ask a *mandamus* commanding *Vignie* and others to issue an advertizement for a new election, they being the persons who constituted the board of directors, prior to the alleged illegal election, under color of which *Peters* and others had assumed to act. All the directors of the board, except two, have answered: "That the said board of directors of the Louisiana State Bank did not deem themselves authorized, from the return of the judges of the election, for the election of directors of said bank, held on the 5th instant (February, 1849,) to order a new election of directors to be made; and could not therefore issue advertizements for another election to be held:" Wherefore they say, "they submit to such judgement and mandate

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as the nature of the case may require, and as may be finally rendered in the premises." The two members of the old board who did not join in this answer, are members of the new board; and, as they claim to hold under the new election, must be considered as virtually concurring in the position taken by their associates in the old board. The whole of the former board, therefore, must be regarded as acquiescing in the validity of the election of the new board and in their continuance in power. It is obvious then, that the contest in this cause is between *Dufilho, Wiltz* and *Dupré*, on the one hand, and the newly elected board on the other, who, upon the face of the pleadings, are at least directors *de facto*, under the color of election.

The first question which demands our consideration is, can the plaintiffs be heard as relators?

As the general rule it may be conceded that, under our legislation, any stockholder has a right to inquire, by the remedy of *quo warranto*, into the election of those who assume to administer the corporation of which he is a member. But while the defendants do not dispute the general rule, they contend that a party may have so acted as to render himself incompetent or disqualified to become a relator. They argue; "that where the wrong complained of was the result of the party's own misconduct or negligence, the court will refuse an application by him, or at his instance; that the law will not permit any one to play fast and loose—to establish or overturn the effects of his own actions, as may prove most beneficial to him—if it suits him, to take advantage of his own conduct and say nothing—if it does not accord with his views, to declare his own conduct illegal, and avoid his own acts." The authorities cited by the defendants fully sustain this position, and have not been met by any conflicting decisions.

In the case of *King v. Clarke*, 1 East. 47, it was observed:—"The court have indeed on several occasions said, and said wisely, that they will not listen to a corporator who has acquiesced, or perhaps concurred, in the very act, which he afterwards comes to complain of when it suits his purpose." In *Rex v. Stythe*, 6 Barn. and Cres. 240, Abbott C. J. says: "It has generally been considered a rule of corporation law, that a person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the title of those mediately or immediately derived from that election. But in order" said he, "to prevent any misunderstanding upon this point, I will add that, if a person should concur in an election in *ignorance* of some fact making it invalid, and should afterwards come before the court, and show the objection, and *that it has come to his knowledge since the election*, and that it is a matter which ought to be enquired into, I would by no means have it inferred from the decision in the present case that, such an application ought not to be heard." In the *Queen v. Greene*, 2 Adolp. and Ellis, 463, Denman, C. J. observed: "The principle which precludes a party, having acted as the relator did in this instance, from applying afterwards to set the proceedings aside, is the same which prevails in other cases, namely, that a man shall not take his chance of inconsistent advantages." And Coleridge, Justice, on the same occasion, assumed it to be the settled rule, "that a man shall not apply to the court as relator, if he has concurred in the irregularity of which he complains." See also Angell and Ames, on Corp., p. 707.

Without undertaking to say to what extent these opinions would be followed in this country in questions concerning municipal corporations, we have no hesitation in recognizing their propriety as applied to private corporations. Such being the well settled doctrine, it remains to be considered how far it is applicable to the case at bar.

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PETERS.

The petitioners allege that they were appointed commissioners of election for directors of the bank, and that, acting in that capacity, they received votes to which objection had been made. The certificate which they themselves signed, on the 5th of February, shows that the defendants, who now claim to be the duly elected directors of the bank, obtained a plurality of the votes offered at the election, and received by the plaintiffs themselves in their capacity of judges. It is now charged by the petitioners that a large portion of the votes were not given according to law, and were given by persons not *bond fide* owners of the shares. But although objections, as it is alleged in the petition, were made at the time, to the reception of those votes, the plaintiffs themselves, whose duty it was to ascertain the disputed legality, received them. Under such circumstances, we are of the opinion that they cannot be heard as relators.

It is proper to observe that, although the plaintiffs, as commissioners, acting with the two other commissioners, *Hermann* and *Rochereau*, received all the votes, notwithstanding objections made by stockholders at the time, and signed, on the day of election, a certificate showing the number of votes given to the respective candidates, the three plaintiffs signed, two days afterwards, but without the concurrence of the other two commissioners, a declaration that they decline to certify or declare either ticket elected. But we cannot perceive how this subsequent declaration destroys the effect, of their previous reception of the votes, upon the question of their competency now to impeach, as relators, the legality of those votes. The declaration on the 7th stands in conflict with their acts on the 5th.

It is also proper to add, in this connection, that the only protest of the stockholders against the reception of votes exhibited in the record, is a protest made by the successful candidates.

We are not to be understood as saying that a party can, in no case, be heard to impeach an election over which he presided, and the legality of votes which he himself, as commissioner, received. A case might occur where the illegality rested upon facts, as to which the party subsequently complaining was ignorant at the time, and was without the means of knowledge. Consent induced by error is not binding, in the eye of the law. But the petition contains no such allegation; and no foundation therefore has been laid in the pleadings, nor even in the evidence, for a departure from a wholesome and equitable general rule.

A variety of points were discussed at bar, upon which, in consequence of the views already expressed, we do not deem it necessary to enlarge. It is, however, not improper to observe that, although the charter of the bank declares that the directors shall be elected by a plurality of the votes of qualified stockholders, and although the petitioners have admitted in the petition that the persons whose motion is asked had a nominal majority, they have not proved that a single illegal vote was given in favor of those persons, nor even that a single illegal vote was received at all.

Three of the defendants, *Peters*, *Shaw* and *Converse*, filed an answer, in which they aver "that they have resigned the offices of directors of the Louisiana State Bank, under the election set forth in the petition, and disclaim all title to be directors of the said bank, in virtue of said election." It was alleged, in the petition, that *Peters*, *Converse* and *Shaw* were, at the time of their being voted for, directors of the City Bank, and so continued until after the 5th instant. It is questionable whether the disclaimer, as framed, is to be deemed an admission, on their part of the existence of the alleged disability. But if it be so considered, it

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cannot be regarded as binding on the other defendants, who have not concurred in it, nor on the corporation. No evidence has been adduced that such disability existed; and the plaintiff's counsel, in his brief, admits that the disclaimer by the three in no manner alters the issue as to the other six, who formally denied all the allegations of the petition, except such as were expressly admitted. It is proper to add that, the appeal is taken by the six directors.

While it is the duty of our courts to grant the extraordinary remedy of *quo warranto* to all those who are entitled to it under the liberal provisions of our Code, it is equally their duty to administer the remedy with reference to the principles recognized in that jurisprudence from which the writ was derived, so far as those principles are consistent with the spirit of our institutions, and with sound reason and equity. Dissensions and lawsuits between the members of a corporation, like quarrels in a family or partnership, are dangerous to its well being; and those who bring matters pertaining to its administration before the tribunals, ought not only to prove that irregularities have been committed, but should also be free from the objection of having participated or acquiesced in them. A court of justice, in such cases, cannot be expected to take assertions for proof, nor even to hear a party whose complaints are inconsistent with his own conduct.

When any competent stockholder presents before us a case in which the irregularities are proved, which are complained of by the plaintiffs, and are, in their turn, asserted in recrimination by the defendants, it will be our duty to declare their legal effect. Until then it is unnecessary, and would be improper, to do so.

Upon the question of the jurisdiction of this court, which was suggested by the plaintiffs, we deem it unnecessary to do more than refer to the reasons given by the district judge, on the motion taken below to set aside the order of appeal. The allegation of the petition was, that the new directors did "induct themselves, on the 12th inst., into the bank as directors, and, so pretending themselves, did proceed to elect *Samuel J. Peters*, as their president, and have taken unlawful possession of the said institution, to the loss and injury of the stockholders to a large amount, and of your petitioners in particular, as stockholders, in a sum exceeding \$5000."

It is therefore decreed that, the judgment of the court below be reversed, and that the petition of the plaintiffs be dismissed; the plaintiffs paying the costs in both courts.

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### AMONETT, Executor, v. FISK.

A party to an action, to whom an interrogatory is propounded by his adversary, may state in his answer any matter pertinent to the issue, and clearly connected with the facts which his adversary is seeking to establish. The answer may be qualified by the statement of facts which would prevent the consequences of an absolute and unqualified answer.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Vason*, for the plaintiff. *Elmore and W. W. King*, for the appellant. The judgment of the court was pronounced by

**SLIDELL, J.** To what extent a party interrogated may carry his answers be-

yond a categorical reply to the questions propounded, was a subject considered in the case of *Haynes v. Heard*, 3. An. 648. The court below correctly refused to strike out a portion of the answers of the defendant, and they were properly received as evidence.\*

Upon the question of privilege, we deem it unnecessary to do more than to refer to the satisfactory opinion of the district judge.

As the evidence was conflicting, and was considered by the district judge as leaving in doubt the right of the defendant to a judgment against the succession for the amount of the balance of the account, we will not disturb the judgment in that respect. But, under all the circumstances, we deem it equitable to reserve the rights of the defendant, if any there be, against the succession of *Slaughter*.

It is therefore decreed that the judgment of the court below be so amended, as to reserve the rights of the succession of *Abijah Fisk*, if any it may have, against the succession of *Slaughter*; and that, so amended, the judgment be in all respects affirmed; the costs of the appeal to be paid by the appellee.

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### WILSON et al. v. CHURCHMAN.

Whatever may be the right of a party to appeal at once from a refusal to set aside a sequestration by which his property is actually detained in legal custody, it cannot be extended to the case of one who has been restored to possession by giving bond. It cannot be said that the judgment works, or may work, an irreparable injury, which is the test by which to determine whether an appeal will lie from an interlocutory judgment before a trial on the merits.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hulton and Micou*, for the plaintiffs. *T. R. Wolfe, Lockett and Goold*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. A sequestration having been levied upon goods, *Gilchrist* bonded them, and a rule was then taken by the defendant and *Gilchrist*, to show cause why the sequestration should not be set aside. Upon hearing, the court dismissed the rule; and from this refusal to set aside the sequestration, the defendant and third opponent appealed.

Whatever may be the right of a party to appeal at once from the refusal to set

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\*Plaintiff propounded the following interrogatories to the defendant. "Did you receive the twenty-two bales of cotton consigned to you in the annexed bills of lading? Have you sold them? If yea, when and to whom, and at what price?" To these interrogatories the defendant answered: "He did receive twenty-two bales of cotton from *W. C. Watson*, the overseer of a plantation called *Deahl's* plantation, which was said to belong to the succession of *Slaughter*: That said *Watson* acted as overseer, and had the management and control thereof, with the knowledge and consent of the legal representatives of the said succession; and that *Watson* informed the deponent that certain supplies were necessary to carry on the said plantation, and the hiring of certain negroes, of which deponent had the control, was necessary to save the then growing crop; that this took place about the 5th of August: That deponent is certain, from his own knowledge of the affairs of said plantation and the means of the succession, that this information was correct: That he accordingly agreed to furnish the necessary supplies, and to hire the negroes, with the understanding that *Watson* was to send him the cotton made on the plantation for sale, and that he was to be reimbursed out of it: That deponent did furnish the supplies, as charged in his account filed with this answer, and did hire the negroes as therein charged, making the sum of \$1406 48: That *Watson* never sent him but the twenty-two bales above mentioned, which were sold to Messrs. *F. M. Weld & Co.*, as per the annexed account of sales, and amounted to the nett price of \$555 80, after paying the charges upon the same, which left a balance still due him of \$850 68." The motion of the plaintiff was, to strike out that part of the answer printed in italics.

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aside a sequestration, by which his property is actually detained in legal custody, we think the right should not be extended to a case where the party has been restored to the possession by giving bond. It cannot be said, in such a case, that the judgment works, or may work, an irreparable injury; which is the proper test in determining whether an interlocutory judgment is appealable, before a trial on the merits. See *Hart v. Philips*, 1 Rob. 223.

Considering the present appeal premature, it is therefore dismissed, at the cost of the appellants.

NOTT et ux. v. MARCHESSEAU.

Proof that plaintiff's attorney offered to defendant to rescind the sale of a slave on receiving back the price, and that the offer was rejected by defendant, who said that a law suit was unavoidable, will dispense with the necessity of a tender of the slave before suing to rescind the sale.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Griffin*, for the plaintiffs. *Barthe*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiffs allege that they purchased of the defendant a negro woman and two children, for a sound price and under full guarantee; that before, and at the time of the sale, the slave was afflicted, to the knowledge of the defendant, with a redhibitory disease, which renders her absolutely useless. A rescision of the sale is claimed, with damages and interest. The answer is a general denial. There was judgment in favor of the plaintiffs that the sale be cancelled, and that the defendant be condemned to take back the slave sold, and her two children, and to refund the price. The defendant has appealed; and the plaintiffs ask that the judgment be amended, by allowing them the damages and interest claimed in their petition.

The defendant contends that the slave in controversy, and her two children, should have been tendered to him, and that, without such a tender, the plaintiffs cannot maintain their action. It is admitted in the record that the attorney of the plaintiffs offered to the defendant to return the slave, and to rescind the sale, on receiving back the purchase money, and that the offer was rejected by the defendant, who said that a law suit was unavoidable. This declaration of the defendant, that he was determined to have a law suit, dispensed the plaintiff from the formality of making a tender in the form prescribed by law.

On the merits, the case turns exclusively upon questions of fact, and the judgment is fully sustained by the evidence. We concur with the district judge that the plaintiffs have not made out their claim for damages or interest.

*Judgment affirmed.*

MARTIN et al. v. CHRYSTAL.

It is not necessary, to subject a party to the penalties imposed by the tenth section of the stat. of 28 March, 1840, abolishing imprisonment for debt, on one purchasing merchandize for cash and disposing of the same, or removing it beyond the reach of his vendor, without

having paid the price, that he should have been the principal in the transaction, where it is shown that the purchase of the articles was a fraud contrived between another person and himself, probably for their mutual benefit. The law will hold both to have been purchasers.

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Art. 107 of the constitution relates exclusively to criminal proceedings.

Judicial proceedings, having for their object the incarceration of the debtor to compel the payment of his debts, or instituted against a debtor guilty of fraud, have always been held by our courts to be civil, and not criminal proceedings. Proceedings against an insolvent debtor for fraud, under the stat. of 28 March, 1840, are civil proceedings.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. T. R. Wolfe*, for the plaintiffs. *Race, Foster and Soulé*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. The defendant is appellant from a judgment of the Third District Court of New Orleans, by which he was adjudged to pay the plaintiffs the sum of \$965 94, with interest from judicial demand, and to be imprisoned for the period of two years from the day of the rendition of the judgment,

The proceedings against the appelant where instituted under the act of the 28th of March, 1840, entitled *An act to abolish imprisonment for debt*. The trial by jury was waived, and the court held the defendant guilty of fraud under the tenth section of said act, in having purchased merchandize in New Orleans for cash, and having obtained possession thereof and having disposed of the same, and removed it beyond the reach of his vendors, without having paid the price or any part thereof.

It is contended that *Chrystal* was not considered by the plaintiffs as the principal in the transaction. We do not think that this was necessary, in order to sustain the judgment under the act. It appears manifest that the purchase of the plaintiffs' articles by *Van Allen*, was a fraud concocted between him and the defendant, probably for mutual benefit, and that in the eye of the law both are held to be purchasers. The evidence on this point, we consider, fully supports the judgment.

It is urged in behalf of the defendants that, the proceeding in this case is a prosecution for the violation of a statute, which carries with it a grievous penalty—that of imprisonment for a term not exceeding three years; that the prosecution is essentially a criminal one, and, not being instituted by and in the name of the State, but conducted on the petition of the plaintiffs solely, it cannot be sustained under art. 107 of the constitution. That art. provides that, "prosecutions shall be by indictment or information," "*Les poursuites criminelles se feront par acte d'accusation ou sur information.*" This provision was not in the old constitution. But from section 18 of art. 6 of the constitution of 1812; and from the other provisions of art. 107, evidently refers exclusively to criminal proceedings.

Judicial proceedings having for their object the incarceration of the debtor for the payment of his debts, have always been held by our courts to be civil and not criminal proceedings. Notwithstanding the caution with which the rights of the routine citizen were protected by the laws, after a certain delay in the payment of a debt the debtor was delivered into the power of the debtor by virtue of a sanguinary law of the twelve tables; and although civilization and humanity in time modified it, its vestiges still exist under our modern social systems. In Louisiana the writ of *capias ad satisfaciendum*, in ordinary cases of debt, was only abolished by this act of 1840. The object and policy of that writ was not the punishment of the debtor, but to force him to discharge his debt by depriving him of his



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liberty. Under this view of the subject, the Supreme Court held the proceedings under this act to be civil and not criminal, in *Maurin's* case, 15 La. 536. That case was one that attracted great attention at the time, and was fully and thoroughly considered. Under the insolvent acts of 1808 and 1817, the proceedings against debtors guilty of fraud, under which the gravest penalties were incurred, have always been held to be civil proceedings; and the Supreme Court has not only uniformly taken cognizance of them, but has more than once reversed verdicts of juries by which the defendants had been acquitted—a power which no court would attempt to assume in any other than a civil proceeding. *Andrews v. His Creditors*, 11 La. 467. *Castel v. Creditors*, 4 La. 574. *Coquet v. Creditors*, 4 La. 198. *Prados v. Creditors*, 1 La. 175.

Considering the character of these proceedings under our jurisprudence, as settled by decisions in the court of the last resort, we think the provisions of the 107th art. of the constitution not applicable to them, it relating only to criminal prosecutions.

*Judgment affirmed.*

### RICE v. WALSH.

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An affidavit by a party "that the facts set forth in the above petition, which in his opinion render an injunction necessary, are true to the best of his knowledge and belief," is insufficient to sustain an injunction, for its uncertainty. It is susceptible of two constructions; one of which, that the party means to swear that such of the facts stated in the petition as, in his opinion, render an injunction necessary, are true, would render it defective. The affidavit must be clear and unequivocal, establishing all the facts which would warrant the interference of the court, and laying a clear basis for an indictment for perjury, if any of the assertions be untrue.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. H. A. Bullard and Frost*, for the appellant. *Warfield and Rand*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This appeal is taken from a judgment of the court sustaining a motion to dissolve the injunction obtained by plaintiff, upon the ground, among others, that the affidavit was defective. It was in these words: "*Dan Rice*, the above named petitioner, makes oath that the facts set forth in the above petition, which in his opinion render an injunction necessary, are true to the best of his knowledge and belief."

This affidavit is susceptible of two constructions. One is, that the plaintiff means to swear that the facts set forth in the petition are true, and that in his opinion they render an injunction necessary. The other is, that he means to swear that such of the facts stated, as in his opinion render an injunction necessary, are true. Construed in the former sense, the affidavit would be good; in the other, it would be defective.

A party applying for an injunction should present an affidavit clear and unequivocal, establishing, by his oath, all the facts which would warrant the interference of the court, and laying a clear basis for an indictment for perjury, if any of the assertions sworn to be untrue. When the affidavit has a doubtful aspect, as in the present case, the injunction ought not to be granted or maintained. See *Hubert v. Tody*, 5 La. 52. *Canal Bank v. Carriel*, 3 An. 115.

It is conceded, however, that the allowance of ten per cent interest was incorrect, the case not being within the statute of 1831.

It is therefore decreed, that the judgment of the District court be amended, by striking therefrom the allowance of ten per cent interest, and that so amended it be affirmed; the appellee paying the costs of this appeal.

RICH  
v.  
WALSH.

### THIERRY et al. v. LAFFON.

The payee of a bill of exchange drawn abroad, payable and protested here, cannot recover damages against the acceptor.

In an action, by the payees, on a bill endorsed by themselves, and afterwards by a third person, in blank, it is unnecessary to state such endorsements in the petition, or, in the absence of any evidence to impugn the title of the plaintiffs, to prove them on the trial.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Lombard*, for the plaintiffs. *Griffin*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs, as payees of a bill of exchange, drawn in Paris, and payable in New Orleans, sue the defendant as acceptor. The judgment allows the plaintiffs the amount of the bill, with interest from date of protest, and five per cent damages. We are not aware of any law allowing damages against the acceptor, under the circumstances. In the case referred to (*Pecquet v. Mayer*, 14 La. 74,) the defendant was the drawer of the bills.

The bill exhibits the blank endorsements of the payees and of one *Tighler*. These endorsements were not stated in the petition. It was not necessary so to state them, nor to prove them at the trial. See the case of *Hepburn v. Ratliff*, 2 An. 331. There was no evidence offered by the defendant to impugn the title of the plaintiffs.

It is therefore, decreed, that the judgment be amended by striking therefrom the allowance of damages; and that, so amended, the judgment be affirmed; the plaintiff paying the costs of this appeal.

### SUCCESSION OF PREVOST.

After the lapse of a century, a marriage, which had never been doubted or denied, must be held to have been duly solemnized.

A marriage, celebrated in Louisiana before the year 1787, maybe proved by reputation. *Per Cur:* Under the laws of Spain, in force at that time, proof of marriage by reputation, was sufficient, in civil suits.

Decision in *Patton v. Philadelphia*, 1 An. 98, affirmed, so far as it declares that the regulations of the council of Trent, in regard to marriages, were never extended to the colony of Louisiana by the king of Spain.

The certificate of a priest, attesting the celebration of a marriage in the Spanish colony of Louisiana, before the year 1787, though not signed by the parties nor by witnesses, is proof of a legal marriage.

Where the marriage of the parents has been proved, parol evidence is sufficient to establish the legitimacy of their children.

No objection to evidence will be considered on appeal, unless specified, and reserved, in a bill of exceptions. No notice will be taken of any agreement, alleged by the counsel of one party to have been made with the other party, that the evidence was received subject to all legal exceptions.

SUCCESSION  
OF  
PREVOST

**A** PPEAL from the District Court of St. Bernard, *Rousseau, J. Griffon and Simon*, for the petitioners. *Buisson and Maurian*, for the appellants. The judgment of the court was pronounced by

ROST, J. *Rosalie Verret* and others sue to be recognized as collateral heirs of *Eduard Prevost*, who died leaving neither descendants nor ascendants. They allege their legitimate descent from *Nicolas Verret* and *Marie Cantrelle*, his wife, who were the common grand-father and grand-mother of themselves and the deceased. The children of the late *Mrs. Hanoteau*, a first cousin of the deceased, oppose the plaintiffs' claims, and allege themselves to be his only legitimate heirs. They contend that the evidence furnished by the plaintiffs in support of their pretensions, is either null, or insufficient to establish their quality of heirs. The court below considered the evidence of the plaintiffs sufficient, and ordered that they be put in possession, in equal shares, of nineteen-twentieths of the succession, reserving the other one-twentieth to the children of *Mrs. Hanoteau*, in right of their mother. The opponents have appealed.

In the evidence adduced by the plaintiffs to prove their heirship, there are two acts of marriage wanting: that of *Nicolas Verret* and *Marie Cantrelle*, the common grand father and grand mother of the appellees and of the deceased, and that of *Louis Verret* and *Marie Patin*, the father and mother of four of the appellees. There are also two acts of baptism wanting: that of *Adolphe Verret* and that of *Martial Verret*, two of the appellees, sons of *Jacques Verret* by his second marriage.

The marriage of *Nicolas Verret* and *Marie Cantrelle* must have taken place before the year 1749, as their first child *Marie* was baptized on the 16th Sept. of that year. It is proved that the records of the marriages celebrated in New Orleans from the year 1720 to 1772 were regularly kept, and that those records were lost in the conflagration of the 21st March, 1788, which destroyed this city.

*Verret* resided in the city of New Orleans, and all his children were baptized there, as his legitimate issue from *Marie Cantrelle*. We would presume from these facts, if it were necessary, that the marriage was also celebrated there. But, after the lapse of a century, without the legality of this marriage having ever been doubted, controverted, or denied, it must be held to have been duly solemnized. *Clapier et al. v. Banks*, 10 La. 68.

The marriage of *Louis Verret* and *Marie Patin* is proved by reputation. It is shown that the act of marriage cannot be found in the parish of *Pointe Coupée*, where the marriage is said to have been celebrated. But the certificates of baptism of his four children, in which they are recognized as legitimate, are produced. These children are acknowledged by the other appellees as their coheirs, and witnesses testify to their *status* as legitimate children, and that they inherited, as such, the succession of their father.

This is not a case in which proof of the due solemnization of the marriage is necessary. The marriage must have taken place before 1787, *Godfrey Verret* the first issue of it, having been baptized on the 18th of February of that year. Under the law of Spain, in force at that time, proof of marriage by reputation, was sufficient in civil suits. "Præsumptio se sola probat, tantum semiplene," says Ferraris, in his *Bibliotheca Canonica, Juridica, &c.* vol. 7, *verbo* *Præsumptio*, no. 17; but he adds: "Si autem præsumptio probabilis adjuvetur publica fama, vel aliis adminiculis, potest etiam facere plenam probationem; colligitur clare ex cap. illud 11 de Præsumptionibus, (the writer, I suppose, refers to Menochius,) juncto ejus summario, ubi dicitur, quod per cohabita-

tionem diutnam et famam de matrimonio, aliaque adminicula, probatur matrimonium; et ex cap. tertio loc. 13 eodem, juncta glossa a DD. Ibidem." Same author, no. 18.

Presumptio vehemens, seu violenta, facit plenam probationem, adeo ut ad condemnationem sufficiat saltem in causis civilibus, non nimium arduis." Ib. no. 19.

Ex solis presumptionibus etiam vehementibus nemo in causâ criminali criminaliter mota condemnandus est, nisi tamen sint indubitata, luce clariora, seu talia quæ evidentiam rei inducant. Ib. no. 20.

The evidence adduced is sufficient for the purposes of this suit.

It is urged by the opponents that, during the dominion of Spain, marriages were regulated by the council of Trent, which required them to be celebrated by the *parrochus* of the parties, or a priest delegated by him, in presence of two witnesses, under the pain of nullity; and that as the certificates of the priest, adduced as evidence of the marriage of *Jacques Verret* with *Marguerite Schweitzer*, and of *Augustin Verret* with *Marie Bujeaud*, are signed neither by the parties nor by witnesses, they are not proof of a legal marriage.

In the case of *Patton v. The cities of Philadelphia and New Orleans*, 1 An. p. 104, this question was thoroughly examined; and we came to the conclusion that the regulations of the council of Trent, in relation to marriages, were never extended to the colony of Louisiana. We adhere to this opinion, and are satisfied that the solemnization of these two marriages was sufficient, under the regulations of the church, as they existed before the council of Trent.

The affidavits of *Adolphe* and *Martial Verret*, introduced without opposition, and the testimony of their godfather and godmother, prove their legitimate filiation from *Jacques Verret*, and also that of their brothers and sisters. This evidence, is corroborated by the testimony of *Aurélien Verret*, who stated that he knows all the petitioners, either personally or by reputation; that the genealogical tableau filed in this case is correct; and that all the children of *Nicolas Verret* and *Marie Canfrelle* had died before the institution of this suit; that he knows personally all the children of *Louis Verret*; that it is to his knowledge that they inherited their father's estate; that they were always reputed legitimate; and that, if they were not, he would certainly know it.

Considering as proved the marriages of the fathers and mothers of the plaintiffs, the evidence adduced by them sufficiently proves their legitimate filiation. *Hobdy v. Jones*, 2 An. 944.

In coming to this conclusion we have taken no notice of the agreement alleged by the opponents to exist between them and the plaintiffs, that the documents and affidavits offered in evidence were received subject to all legal exceptions. Under the uniform jurisprudence of this court, no objections to evidence can be considered on appeal, unless they are specified and reserved by a bill of exceptions.

*Judgment affirmed.*

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### CONREY v. HARRISON et al.

Where interrogatories are propounded to a plaintiff in answer to one of which he states that defendant is indebted to him in the amount sued for in an action against him as drawer of a bill of exchange, it will be unnecessary to make any further proof of his claim until the answer is rebutted by sufficient evidence.

CONREY  
v.  
HARRISON.

An agent, in possession of a bill endorsed in blank, may maintain an action on it in his own name. The fact that the bill belonged to a third person is unimportant, except to enable the defendant to oppose any equitable defence against the true owner. Where a court of the first instance is not required to pronounce on an exception of *lis pendens*, before going to trial on the merits, it will be considered as waived.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy J. Lockett* and *Goold*, for the plaintiff. *J. and H. H. Straubridge*, for the appellants. The judgment of the court was pronounced by

**SLIDELL, J.** The defendant, *Harrison*, demands the renewal of the judgment, upon the ground that there is no evidence that he received notice of protest of the bill of exchange, upon which he is charged,

*Harrison* propounded interrogatories to the plaintiff, in answer to one of which the plaintiff replied that, *Harrison* was indebted to him, for the reasons alleged in the petition, in the sum there stated, subject to certain credits as stated in the answer. It was not necessary to make further proof until this answer was rebutted by sufficient testimony. With regard to the fact disclosed in the plaintiff's answers, that the bill belonged to the bank of Charleston, whose agent the plaintiff is, it was unimportant, except to enable the defendant to show an equitable defence against the true owner, which he has not done. The bill being endorsed in blank, and in *Conrey's* possession, he could maintain an action upon it in his own name.

*Elbert* pleaded the pendency of another suit against him; but there is nothing in the transcript to show that the court was called to pronounce upon this exception, before going to trial upon the merits. See *Kempe v. Hunt*, 4 La. 482.

*Judgment affirmed.*

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| 4   | 350  |
| 47  | 1535 |
| 4   | 350  |
| 48  | 1459 |
| 4   | 350  |
| 52  | 804  |
| 52  | 1637 |
| 4   | 350  |
| 104 | 147  |
| 104 | 246  |
| 4   | 350  |
| 115 | 13   |
| 4   | 350  |
| 116 | 48   |

DWIGHT, Curator v. McMILLEN.

A motion to dismiss, on the ground that the transcript was not filed in time, is not required to be made within three days after the filing of the record.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J.* and *H. H. Straubridge*, for the plaintiff. *Lewis and Bermudez*, for the appellant. The judgment of the court (*King, J.* absent), was pronounced by

**SLIDELL, J.** This appeal was returnable on the 1st monday of November, 1847, and the transcript was not filed until the 6th of the ensuing December. The appellee has moved, upon this ground, the dismissal of the case; to which motion the appellant replies that, it was not made within three days after the transcript was filed, and, under the ruling in *O'Reilly v. McLeod*, 2 An. 138, cannot be entertained.

Under the provisions of the Code of Practice we have frequently held that, a party who neglects to file the transcript seasonably, must be considered as having abandoned his appeal. The omission of the appellee to move for the dismissal upon that ground within three days after the filing of the transcript, ought not to bar the appellee, for two reasons: *first*, because he was not cited; and *secondly*, because he cannot be held to constant vigilance, after the legal delay has passed, in watching, day by day, the docket to see at what time the negligent appellant will file the transcript.

The appellee cannot be considered as having waived his right to a dismissal, and the motion must be maintained.

*Appeal dismissed.*

## WILSON et al. v. LAMBETH et al.

In an action on a bill of exchange payable "in current city notes," which plaintiffs aver were, at maturity of the bill, and still are, at *par* and equivalent to specie, where no proof is offered on either side as to their value at maturity or at the time of the trial, judgment must be rendered for the amount payable according to the tenor of the bill, though the notes were below *par* at the maturity of the bill, but at *par* at the time of the trial. It was incumbent on defendants, and not on plaintiffs, to prove the value of the notes at the maturity of the bill, and at the time of the trial.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* In this case there was a judgment below, "that the plaintiffs recover from the defendants, *in solido*, the sum of \$1,800, with legal interest thereon from 21st April, 1842, until paid, and costs." The reasons assigned by the judge for this opinion are as follows: "The plaintiffs claim the sum of \$1,800 from the defendants, *in solido*, under a bill of exchange, payable on the 18th December, 1841, which was accepted to be paid 'in current city notes,' which the petition avers were, at the time of maturity, and are now, at *par*, and equivalent to specie. Defendants pleaded a general denial, but no proof was offered on either side of the state of the currency, either at maturity or at present; but defendants contend that it was the duty of plaintiffs to have offered proof of both, and that they would then be entitled to judgment for the depreciated value at maturity, payable in the currency of the present day. Under the pleadings, it was incumbent on the defendants to have offered proof, to bring the facts, on which they rely, to the notice of the court. They form their ground of defence; without them there is no case, but that of an ordinary suit on a bill of exchange, before the court. The plaintiffs were not bound to offer this proof, although alleged in their petition, if they had made out their case without. It is certainly known to the court personally that, about the time of maturity, the currency of the banks of this city was depreciated; but if it could judicially take notice of this fact, it cannot and does not, either personally or individually, know what was the rate of depreciation, or in what paper the defendants chose to pay (for one of the cases had gone so far as to decide that the choice lay with the debtor).—Orleans or Atchafalaya, for all were, in the sense in which the term is used, 'current.' They only differed from the others in passing at a greater discount. The defendants, in this state of things, with commendable prudence, made a conditional acceptance. Had they paid, or tendered, at maturity, their obligations would have been discharged. They broke the condition, and I am of opinion are bound now to pay according to the tenor of their bill. There is, therefore, judgment for plaintiffs against defendants, *in solido*, &c." The defendants appealed.

*T. R. Wolfe*, for the plaintiffs. *Pitts* and *Wm. M. Randolph*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

**SLIDELL, J.** For the reasons given by the district judge, the judgment of the court below is affirmed, with costs.

## WHITENRIGHT et al. v. LEAVITT et al.

Decision in *Richardson v. Leavitt*, 1 An. 430, affirmed.

WHITENRIGHT  
v.  
LEVITT.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Lockett and Goold*, for the appellants. *Cohen and T. A. Clarke*, for the defendants. The judgment of the court (*Slidell, J.* not sitting, having been of counsel,) was pronounced by

EUSTIS, C. J. The plaintiffs, who are merchants residing in the city of New York, instituted suit against the defendants, *J. W. & R. Leavitt*, who are also merchants in New York, by attachment. The property attached was claimed by the intervenors, under an assignment made in New York. The judgment of the court of the first instance was in favor of the intervenors, and the plaintiffs have appealed; and the sole question for the consideration of the court is, the validity of that assignment. In the case of *Richardson v. Leavitt*, 1 An. 430, this assignment was before the court, and we there held that, it being of personal property in trust, for the payment of particular creditors by preference, and it being valid by the laws of New York where it was executed, and where all the parties resided, and the property being delivered into the possession of the assignees, it was not liable to attachment by a New York creditor for a debt contracted and payable there. The case was much contested, and very thoroughly argued. The argument principally turned upon the effect of the laws of Louisiana upon the assignment, and its validity under the laws of New York does not appear to have been much contested.

It is contended that, under the jurisprudence of New York, the assignment is fraudulent and void, because it appropriates partnership property to the payment of the individual creditors of the partners, and the several property of the members of the firm to the payment of the partnership debts. The only property upon which this assignment was to operate in Louisiana, as far as the evidence shows, was the remains of certain invoices of goods shipped to New Orleans by the defendants for sale on consignment, and the proceeds of certain goods which had been sold on their account; which both appear to be property of the partnership. It appears that in the assignment provision is made for private debts of the partners, as well as for the partnership debts. The assignment is made without imposing on the assignees any discrimination in the payment; and it might well be said that, in executing their trust, they would be held to the distribution which the law would make, and to apply the partnership property first to the payment of the partnership debts. But the authorities referred to by the counsel do not support the position that he has taken. The principal case which he has relied upon is that of *Jackson v. Cornell*, 1 Sanford's Chancery Rep. 348. The assignment held in this case to be void was of *all* the property of the insolvent, real and personal; and in the other cases, in which the rules stated by the counsel have been acted upon, the assignments have been of *all* the property or the great *bulk* of it, and what are termed general assignments. The assignment under consideration purports only to convey that portion of the defendants' property which was in the State of Louisiana, and perhaps an inconsiderable part of their whole estate.

Upon a full consideration of the subject, we adhere to our opinion given in *Richardson's* case:

*Judgment affirmed.*

#### POLICE JURY v. McDONOGH.

Where in an action by a police jury, in which the tax-payers of the parish are the real

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44 306

4 352  
50 1256

4 352  
104 496

4 352  
107 416

parties in interest, the plaintiffs have not made out their case, but there is reason to believe they can do so if another trial be allowed, the case will be remanded for further proceedings.

POLICE JURY  
v.  
McDONOUGH.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. T. G. Morgan*, for the plaintiffs. *Roselius*, for the appellant. The judgment of the court was pronounced by

ROST, J. The defendant has appealed from a judgment rendered against him in favor of the plaintiffs, for the cost of a levée made in front of his land, in the parish of East Baton Rouge.

The inspector of roads and levées for the district in which the land is situated, adjudicated the making of the levée to *F. D. Newcomb*, for \$950. The levée was made and accepted by the plaintiffs, and *Newcomb*, having ascertained that the inspector had failed to notify the absent proprietor in the manner required by the act of 1829 concerning roads and levées, claimed the amount of the adjudication from the police jury, and obtained against them a judgment, which was affirmed on appeal, and has since been satisfied. 4 Rob. 233. This action has been instituted, on the intimation of the Supreme Court in that case, that the absent proprietor was liable upon a *quantum meruit*, to the amount he had been benefitted by the work done. The defence is a general denial, and an allegation that the work was of no value, benefit, or advantage to the defendant. The defendant has also pleaded in this court, the prescriptions of one and three years.

The value of the work, and the extent to which the defendant has been benefitted by it, are the only questions at issue. The only evidence by which the plaintiffs have attempted to support their allegations is that of the witness *Carl*, who testified that the value of the work was the amount of the adjudication to *Newcomb*, "he," says the witness, "being the lowest bidder, although other men, who were good judges of the value of the work, were present at the adjudication, and bidding." This witness does not know the quantity of work done, and takes the adjudication as the measure of value.

It was held, in the former case, that the adjudication was illegal for want of proper notice to *McDonogh*; and the notice required by the act of 1829, is not shown in this case to have been given. Under this state of facts, the defendant cannot be bound by the adjudication in any manner.

The plaintiffs have not made out their case. But as they are only plaintiffs in name, the tax-payers of the parish being the real parties in interest, we will, as has been customary with this court in such cases, remand the case for further proceedings. This disposition of it, will enable the plaintiffs to controvert the plea of prescription filed on the appeal.

It is, therefore, ordered, that the judgment in this case be reversed, and the case remanded for further proceedings according to law; the plaintiffs and appellees paying the costs of this appeal.

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### ALVA v. JAMET et al.

In an action to enforce the tacit mortgage of a minor against real estate held by a third person under a title derived from the tutor, the burden of proving that there is other property first liable for plaintiff's claim is upon such third person.



ALVA  
v.  
JAMET.

**A**PPEAL from the Second District Court of New Orleans, *McHenry J.* presiding. *Grandmont*, for the plaintiff. *Preaux*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff was the creditor of *Chevarre*, her late tutor, and as such had a tacit mortgage upon his property. The present action was brought in the *via ordinaria*, to enforce the tacit mortgage on certain real estate which the defendant derived by mesne conveyances from the tutor. The prayer of the petition was that, the defendants be cited, and that, after due proceedings, there might be a decree subjecting the real estate to sale for the payment of the plaintiff's claim. We see no objection to this mode of proceeding, which certainly cannot be characterized as summary. If there was other property first liable to the plaintiff's claim, it was for the defendants to show it. They permitted judgment to go by default, and to be confirmed upon proof of the plaintiff's rights as a minor; and we see no reason to disturb the decree.

*Judgment affirmed.*

### CONNOLLY et al. v. ADAMS.

One partner cannot sue his co-partner, to recover the share of the latter in the loss in a particular transaction. He must sue for a settlement of the partnership.

**A**PPEAL by the plaintiffs from a judgment of the Fourth District Court of New Orleans, *Strawbridge, J.* The judgment of the court below was in these words:

"The petition alleges that plaintiffs entered into an agreement, by which they, in Cincinnati, were to draw bills on merchandize shipped to defendant, and that they were to be jointly interested in the commissions; that, in the result, there was a loss of \$12,000, one-half of which they claimed from the defendant. They further claim \$2,000 for a separate transaction in relation to a quantity of land. I think this language establishes that there was a partnership between the parties as factors and commission merchants; and I further think that the case falls within the rule laid down in *Levy's case*, 11 La. 581, and also under these numerous cases, so frequently before these courts, viz.: that a partner's remedy is by suit for account and settlement of the whole affairs. It is ordered that the suit be dismissed, with costs."

*Elmore and W. W. King*, for the appellants, contended that the parties were not commercial partners; that if there was any partnership, it was a particular one. C. C. 2796, 2806, 2809. 2 An. R. 156. *Collier on Partn.* pp. 17, 21. *Micou*, for the defendant, cited 11 La. 581. 12 Rob. 595. 2 An. 10, 934. 8 Mart. N. S. 280. 11 Mart. 435. *Story on Partnership*, §§ 221, 348. The judgment of the court was pronounced by

EUSTIS, C. J. For the reasons assigned by the judge of the Fourth District Court of New Orleans, it is ordered that the judgment be affirmed, with costs.

### MILLER v. MILLER et al.

In an action for freedom plaintiff was declared to be free, and the case was remanded for further proceedings as between the defendant and warrantor. The warrantor subsequently instituted an action to annul the judgment, on the ground that it was obtained through

fraud; but there was no evidence that any further proceedings were had under the decree remanding the case, nor any allegation or proof that the warrantor had refunded the price to the party by whom he was cited. On an exception that the petition presented no grounds sufficient to support an action of nullity: *Held*, that the exception should be sustained.

MILLER  
v.  
MILLER.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Claiborne, Micou and Grymes*, for the plaintiff. *W. S. Upton*, for the appellant. The judgment of the court was pronounced by

*Rost, J.* In the case of *Sally Miller v. Louis Belmonti*, decided by the Supreme Court and reported in 11 Rob. 339, the plaintiff was released from the bonds of slavery, and the cause was remanded for further proceedings as between the defendant and his warrantor, *John F. Miller*. No further proceedings have been had under this judgment, and the warrantor, *Miller*, has instituted the present action of nullity to set it aside, on the ground that it was obtained through fraud and ill practices on the part of *Sally Miller* and her witnesses.

The defendant excepted to the petition on the following, amongst other grounds: 1st. That it presents no sufficient ground to sustain an action of nullity. 2d. That no action of nullity will lie after an appeal has been taken to the Supreme Court, and the case finally decided by that tribunal. *Belmonti*, the defendant in the former suit, intervened, and joined with the plaintiff in the prayer of his petition. The defendant's exception having been overruled, she answered on the merits. There was judgment in favor of the defendant in the first instance, and *John F. Miller* has appealed. But *Belmonti*, the real party in interest, does not join in the appeal, and appears to have acquiesced in the judgment.

We express no opinion upon the question, whether a final judgment of the Supreme Court can be avoided by an action of nullity, being of opinion that the first exception should have been sustained. It is not shown that any further proceedings have been had under the former decree of the Supreme Court; nor has the plaintiff alleged or proved that he has refunded the price to *Belmonti*, and that he is subrogated to his rights. He had no interest in contesting the former decree, and therefore no capacity to do so.

To the observations of the counsel that the only object of the plaintiff in bringing this suit was to vindicate his character, it is a sufficient answer that the action itself involves rights of property, and that he should have brought himself within the rules prescribed for that class of actions. We may at the same time state, without impropriety, that we have carefully perused the new evidence discovered by him; that it stands in the record unimpeached, and is in direct conflict with that adduced by the defendant in the former suit to prove her birth and condition. If it can be true that the defendant is of German extraction, we consider the plaintiff as exonerated from all knowledge of that fact.

*Appeal dismissed.*

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#### SCHNAUFER v. SCHNAUFER.

Where in an action for a separation from bed and board, instituted by the husband, a curator *ad hoc* was appointed to represent the wife, who was an absentee, but the case was tried without any issue joined, or judgment by default regularly taken, judgment cannot be rendered for the plaintiff.

SCHNAUFER  
v.  
SCHNAUFER.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. W. S. Upton*, for the appellant. *Emerson*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action by the plaintiff for a separation from bed and board from the defendant, his wife, on account of voluntary abandonment and adultery on her part. The parties are alleged to have been married in Germany, in 1819, and the plaintiff alleges that he had acquired a domicile in New Orleans. A curator was appointed to represent the defendant, who it is not charged was ever in the State, and whose place of abode is in New York, where she was left by her husband, in 1837. The plaintiff was non-suited, after evidence being heard, in the District court, and he has appealed. The case has been submitted by the counsel appointed to represent the defendant, without argument.

The cause was tried without any answer having been filed by the representative of the defendant. Under these circumstances, we do not feel ourselves at liberty to relieve the plaintiff. He had no right to try a cause against an absentee, without issue joined, or a judgment by default regularly taken. He must abide by the result however irregular the proceedings have been. *Kincaid v. Higgins*, 7 Bibb's Rep. 396.

The judgment of the District court cannot be affirmed, but the appeal can be dismissed; and it is accordingly dismissed, at the costs of the appellant.

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#### PLYMPTON v. PRESTON et al.

Notice to a person, before his appointment as agent, will not be binding on the principal. The Code, while it requires notice to a debtor of the transfer of a debt, has not prescribed any particular form in which it must be given. C. C. 2613. Nor will any misdescription, even as to the amount of the debt, vitiate the notice, where, from the rest of the description and the circumstances of the case, the error could not have misled the party notified.

The mere institution of an action, by the creditors of one who had made a *cessio bonorum* under the stat. of 1817, and who had since acquired other property, to compel a new surrender, does not render the insolvent incapable, from the commencement of such action, of alienating his property in favor of a *bona fide* purchaser. Under that statute, such newly acquired property cannot be considered as thenceforth in the custody of the law. Until a judicial investigation has been had and a decree pronounced, the further liability of the insolvent is a matter *en pais*. Any other construction would defeat the policy of the statute.

Every one, not prohibited by law, may buy or sell.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Benjamin and Micou*, for the appellant. *Preston, Lockett and Gould*, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. In 1844, *Preston* gave a mortgage in favor of *G. W. Boyd*, for \$8000. This debt was reduced by payments to \$5,500; and, in August, 1847, *Boyd* transferred the debt and mortgage to *Plympton*. *Preston* having refused to pay the accruing interest, *Plympton* brought suit against him in the district court of Jefferson. The defendant answered that, *Boyd* had made a *cessio bonorum*, in 1820; but, having subsequently come to better fortune, his creditors had instituted proceedings against him to compel a new surrender, had obtained an order appointing the sheriff syndic, and had cited *Boyd*, by service upon his agent *Florange*, in March, 1847; that, in 1848, the creditors had procured, in the district court of New Orleans, an order to sequester all *Boyd's* property, under which notice of seizure had been served upon *Preston*; that other creditors of *Boyd* had seized the debt in *Preston's* hands, under attachment; that

the transfer to *Plympton* was without legal consideration, and was simulated, and was made for the purpose of defeating *Boyd's* creditors.

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*Plympton*, before being met by this defence, brought a second suit in the parish of Orleans, in which the syndic, the suing creditors, and *Preston*, were made parties. He alleged the validity of *Boyd's* transfer, and the invalidity of the pretensions of the defendant. He also obtained, upon giving bond, an injunction against the defendants, which he prayed might, after due proceedings, be made perpetual.

Our attention will be first directed to the character of the transfer made by *Boyd* to *Plympton* the reality and good faith of which have been attacked.

*Plympton* was a resident of Boston, where he owned real estate. He employed *Hawkes*, a real estate broker, to find a purchaser for his property; and *Hawkes*, having learned that *Boyd*, who was then in Boston, desired to purchase real estate there, brought him and *Plympton* together, and conducted a negotiation between them. This resulted in a written agreement, signed on the 3d July, 1847, by which *Plympton* agreed to convey his real estate to *Boyd* in exchange for two mortgage claims in Louisiana, one of them bearing eight and the other ten per cent interest. One of these claims was the *Preston* debt. It was a condition of the agreement, that *Plympton* should satisfy himself of the security of these claims; and, for that purpose, *Hawkes* addressed a letter of inquiry to *Florance*, a resident of this State, who had been *Boyd's* agent. On the 16th July, *Florance* replied, giving a detailed statement of the nature of the claims, and expressing his entire confidence in the safety of the investment. The agreement was then closed at Boston by *Plympton* and *Boyd*. The former made conveyances of the real estate, which were recorded, and possession was given. The latter forwarded instructions to *Florance* to make a notarial transfer of the mortgages claims to *Boyd*; and a blank power was forwarded to him, signed by *Plympton*, constituting an agent to accept the transfer. This power was filled up with the name of a respectable member of the bar, who was employed to superintend the execution of the notarial transfer. The transfer is dated in August, 1847. A notice was served by the notary on the other debtor a day or two after the act of transfer was signed; and upon *Preston*, in the early part of October following.

After a careful scrutiny of the correspondence, the testimony of the broker and *Florance*, and the documentary evidence connected with this transfer, we have not found any thing which could authorize the belief that it was simulated, or which could cast a suspicion upon the good faith of *Plympton*. He must be, therefore, regarded as a purchaser in good faith, and for a valuable consideration.

It was argued that *Florance's* knowledge of the institution of a suit to compel a new surrender, which knowledge he derived from the service of citation upon him as the attorney of *Boyd*, must be deemed, by legal construction, the knowledge of *Plympton*, who, upon closing his bargain with *Boyd*, constituted *Florance* his agent to take charge of the mortgage claims for him when transferred, and to superintend the preparation and execution at New Orleans of the notarial transfers. The legal effect of the institution of suit by *Boyd's* creditors will be hereafter considered; but whatever its effects, so far as the good faith of *Plympton* and the question of notice are involved, we are of opinion that the knowledge of *Florance* does not effect *Plympton* with constructive notice. The notice did not come to *Florance* while he was concerned for *Plympton*, but before his agency for *Plympton* began. See Story on Agency, p. 140. Story's Equity, p. 408. Livermore on Agency, vol. 2, p. 237. Russell on Factors, 95.

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For the purpose of giving validity to this transfer, as against third persons, it was necessary that notice of the transfer should be given. This, we think has been sufficiently done. The notice delivered to *Preston* by the notary, on the 9th October, 1847, is in the following words :

New Orleans, 24th August, 1847.

SIR : I am requested to inform you that, by an act passed before me on the 13th August instant, *Mr. B. Florance*, acting as the agent of *Geo. W. Boyd*, sold and transferred unto *Ralph Plympton*, of Boston, Massachusetts, the balance of a mortgage executed by you in favor of said *Boyd*, before *E. Barnett*, notary, in this city, on the 28th June, 1844, for twenty-five hundred dollars.

Your ob't servant,

D. I. RICARDO, Not. Pub.

To I. T. PRESTON, Esq.

Giving the defendants the benefit of the strict grammatical construction of the letter, we will consider the words "twenty-five hundred dollars," as referring to the amount of the mortgage. Construed in this sense, there is a discrepancy between the notice and the mortgage, which was for \$8000 originally, and was reduced, at the time of the transfer, to \$5,500. Considered with reference to the contents of the letter as a whole, the mistake is not of such importance as to affect the validity of the notice. The Code requires that notice of the transfer should be given to the debtor (art. 2613), but has not prescribed any particular form. In *Thomas v. Callihan*, 5 Mart. N. S. 182, it was said that a notice of assignment of debt may be fairly assimilated to the notice which must be given to endorsers of promissory notes, although the same exactness and promptitude may not be required in the former case as in the latter. In *Gillett v. Landis*, 17 La. 472, the court said : " We are not aware that any particular form is required in giving notice of a transfer. The principal object of the law appears to be to prevent an improper payment after the debt has been transferred, and to protect the rights of the transferee. It matters not in what manner knowledge of the transfer is brought home to the debtor, provided it be clearly shown that he knew his former creditor was divested of all his rights to the debt assigned, and that such knowledge of the fact was derived from the transferee, or from his agent.

In looking to the analogy of notice in the case of promissory notes, we find that the doctrine rests on a practical and common-sense view of the rights of the parties. As the object of the notice is to put the party in possession of the material facts on which his liability is founded, so as to secure the liability of others over to him, the law requires a sufficiently definite description of the note to enable him to know to what one in particular the notice applies ; for an endorser may have endorsed many notes, of very different dates, sums, and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the notice is special, to which it properly applies. But a misdescription of the note in the notice will not vitiate, if it does not mislead the party to whom it is addressed, and is not calculated to mislead him, whether the misdescription be in the date, or the form, or the names of the parties, or otherwise. Story on Notes, § 349. And so in *Mills v. The Bank of the United States*, 11 Wheaton, 431, a notice which was full and accurate in other respects, but omitted the name of the holder, and stated a wrong date, was held good, there being no other note of like drawer, endorsed by the party. The variance, it was said, could not mislead him, and was not material to guard his rights.

Applying this reasonable standard to the present case, it is impossible to say

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that the defendant was misled, or could have had any doubt, as to the party to whom he was to hold himself liable. A demand of payment by *Boyd*, after the notice, would undoubtedly have been met by a refusal.

As the attachments and sequestrations were all posterior to this notice, they could not in themselves retroact so as to defeat the rights of a *bonâ fide* purchaser. So that we are thus brought to the main question in the cause; and that is, whether the institution of the suit, prior to the transfer, for the purpose of compelling *Boyd* to make a new surrender, created a legal incapacity on his part, from that date, to alienate his property in favor of a *bonâ fide* purchaser.

In the argument of this question it has been strenuously urged by the plaintiff that, *G. W. Boyd* was not a party to the insolvent proceedings which, in the year 1820, were instituted in the district court of New Orleans, under the title of *Wm. Boyd & Son v. Their Creditors*. It is in evidence, that *G. W. Boyd* was the son of *Wm. Boyd*, and a partner of the house of *Wm. Boyd & Son*. The petition in that case describes *William* and *G. W. Boyd* as the petitioners, and is signed by a member of the bar, who describes himself as attorney of the petitioners. The oath, however, was taken by *Wm. Boyd* alone; there is no schedule of the individual assets of *G. W. Boyd*; nor did he appear at the meeting of the creditors. We will concede, however, for the purpose of the present enquiry, and in the absence of proof that the attorney at law was not authorized to appear, that *G. W. Boyd* was a party to the insolvent proceedings, and by reason thereof became discharged from his partnership liabilities, subject to the legal condition of a future liability in the event of his coming to better fortune. This contingent liability is, defined by the act of 1817, which was the law in force when the alleged discharge was granted.

"The surrender of property shall only exonerate the debtor to the amount of the property surrendered; and in case the said property should have been insufficient, if he acquires some other in future, he shall be bound to abandon it until final payment; provided, however, that the creditors to whom the debtor might have become indebted since his failure shall be preferred to the former creditors for their payment on the new property acquired by the debtor, and that means of subsistence shall be left to the debtor and his family."

Waiving the consideration of the question, whether *Florance*, who disclaimed, on record, the right to represent *Boyd*, was competent, under his power of attorney, to be the medium of the citation of his absent principal in a suit of this extraordinary character, we will proceed to consider the effect of the suit as though *Boyd* himself had been personally cited, in March, 1847.

The law of 1817 was certainly conceived as much in a spirit of mercy to the debtor, as of justice towards his creditors. The policy of the law must undoubtedly be respected in the one case as well as the other; and it seems to us that the doctrine contended for by the defendants that, on the mere filing of the petition, an incapacity to alienate at once attaches, and that the newly acquired property of the insolvent is deemed to be thenceforth *in custodia legis*, is repugnant to the spirit of the act and to general principles.

Until a judicial investigation is had, and a decree pronounced, the new liability of the discharged insolvent is a matter *en pais*. Has he acquired means more than sufficient for the subsistence of himself and his family? If he has, the court will order him to surrender the excess when judicially ascertained, and will compel obedience by distringas or other proper process. If he has not, the man is still free. To say that a creditor, by taking this fact for

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granted and filing a petition, may at once tie the debtor's hands, is to defeat the policy of the law, which intended, by discharging the unfortunate debtor, to leave him at liberty to apply his industry to the support of himself and his family, and to open the door to the bettering of his condition. But no man would dare to have dealings with a discharged insolvent, his industry would be paralyzed, and his hopes of better fortune be cut off, if the *ex parte* declaration of a creditor could, *per se*, operate a legal sequestration of the insolvent's earnings.

The legislature might, undoubtedly, enact a law which would accomplish such a result; but a court cannot recognize such a rule, unless it be written down in clear terms in the statute book. The doctrine of relation in bankruptcy, which is found in the english jurisprudence, is the creature of statute. At first, under the of statute Elizabeth, it was very severe, and from the moment of committing an act of bankruptcy, without judicial process, the trader was deprived of all power of charging, or disposing of his property, to the prejudice of his creditors. But this severity was found to be disadvantageous to commerce, and pregnant with injustice to innocent third persons; and was, therefore, much relaxed by subsequent enactments. No one can doubt that the existence of this doctrine of relation at all is solely owing to legislation, without which it would have had no place in the english jurisprudence,

These views are strongly corroborated by a consideration of the second section of the statute of 1826, p. 136.

The point in question was not before the court in the case of *Quemper v. Bierra*, 8 Rob. 204: nor do we find any thing in that opinion which conflicts with the views which we now express. The language of the court seems to us, on the contrary, unfavorable to the defendants: "Whenever the debtor is required to make a new *cession* thereof, this must take place *after* having ascertained the amount of his new debts to be first satisfied, and the extent of his means of subsistence."

We do not concur with the district judge in the applicability to this case, by analogy, of that rule of universal jurisprudence, which is consecrated by article 2428 of the Code. This was not the case of the revendication of a specific thing. See Civil Code, arts. 2420, 2423. Tous ceux auxquels la loi ne l'imterdit pas, peuvent acheter ou vendre.

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#### PLYMPTON v. PRESTON.

Where, in an action by the transferee of a debt secured by mortgage, against the mortgagor, to enforce the mortgage, the defendant resists plaintiff's right to recover, on the ground that the amount due by him had been seized in his hands, by creditors of the transferor, previous to any notice to him of the transfer; and the plaintiff thereupon obtains from another court, on the execution of a bond with surety, an injunction directing the seizing creditors and the defendant to desist from said seizures so far as they affect the collection of the debt sued for in the first action, and so far as they in any manner interfere with, delay, or affect the prosecution of that action, the effect of the injunction will not be to extinguish the seizures, nor to prevent the debtor from defending himself in that action on the ground of the want of notice of the transfer, but to restrain the seizing creditors from any active interference in the action. *Per Cur*: The injunction does not, in terms, forbid the defendant to persist in his defence, nor was that its legal effect.

The production of papers in the possession of the opposite party may be required, even after the trial has commenced, where the party then discovers, for the first time, that his

interests require them; *aliter*, where their importance must have been known to the party before the trial.

Where, by the terms of his contract, a debtor is allowed a certain number of years within which to pay the capital of his debt, on condition of paying the interest punctually at fixed periods, it being expressly stipulated that, in case of failure to pay the interest at any one of those periods, the whole of the debt shall become due and exigible; and the debtor, under the pretext of certain sequestrations and attachments levied on the debt in his hands by creditors of the party to whom the debt was due, in which proceedings he had acted either as the counsel or legal surety of the creditors, and thus assisted in creating their interference with the rights of his creditor, refuses to pay the interest falling due at one of the periods fixed by the contract, and is regularly put in default, the whole debt may be exacted from him.

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**A**PPEAL from the District Court of Jefferson, *Clarke, J. Benjamin and Micou*, for the appellant. *Preston, Lockett and Goold*, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The purpose of this suit is stated in the case of *Plympton v. Preston et al.* ante p. 356. The district judge gave judgment as in case of non-suit, upon the ground that the notification to *Preston* of the transfer by *Boyd* to *Plympton*, was not proved to have been made prior to the seizures levied in the hands of *Preston*.

It is said, by the plaintiff, that such proof was unnecessary, because, as he contends, these seizures had been set aside by the effect of the injunction in the case of *Plympton v. Preston, et al.*; that, by virtue of that injunction, the seizures ceased to have any legal effect, and no longer formed an obstacle to the plaintiff's recovery. The writ of injunction, did restrain the seizing creditors from any active interference in the suit pending in the parish of Jefferson; but it did not extinguish those seizures, nor purport to restrain *Preston* from defending himself in that suit, upon the ground that he was still the debtor of *Boyd* for the benefit of his creditors, because the transfer to *Plympton* was not consummated by notice given before the seizures were levied. Issue was already joined between *Plympton* and *Preston* on the question of the validity of the transfer, the latter resisting the action upon the ground that the seizures were made before the notification of the transfer was given to him. The injunction obtained afterwards does not, in terms, forbid him to persist in the defence, nor do we think that such was its legal effect.

The plaintiff, after the commencement of the trial and after the defendant had closed his testimony, desired, for the purpose of rebutting it and overthrowing the effect of the seizures, to prove a notification of the transfer; and for this purpose called upon the defendant, who was present, to produce the written notice alleged to have been delivered to him. The defendant admitted that, he had in his possession "a paper in relation to a notice handed to him in the street, but that he had it not with him at the moment;" "whereupon the plaintiff prayed that the defendant be ordered to produce and file the paper before the close of the trial, and that a reasonable time be allowed therefor; but the court refused to permit said order to be entered, or to require the production of the paper, on the ground that no such order could be granted after the trial had commenced."

We think the court did not err. The Code of Practice authorizes a call for papers to be made *dans le cours de la plaidoirie*, upon the party's then discovering that his interests require the production of papers in the possession of his adversary. But here the plaintiff knew the necessity of the production of the papers, before he went to trial. *Preston* having pleaded, in his answer, the seizures



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and the absence of the notice. We do not, therefore, feel at liberty to disturb the ruling of the court, or the judgment of non-suit.

We think it proper to express an opinion upon the question, which has been argued by the respective counsel, as to the breach of the condition upon which *Preston* was entitled to a delay in the payment of the principal of his debt. The terms of his contract with *Boyd* were, that he was to be allowed a delay of seven years to pay the principal of an antecedent debt then due, upon paying punctually the interest quarterly; "and should the said *Preston* fail to pay any one installment of interest, in that case the whole of the said debt to be considered as immediately due and exigible, notwithstanding the delay here above specified."

Supposing *Plympton* to have consummated the transfer by timely notice, as was proved in the other suit, the transfer was valid against *Boyd's* creditors, and *Preston* became *Plympton's* debtor. *Plympton*, therefore, having a right to require payment of the interest, having made a demand, and put his debtor in default, it is clear that the condition upon which the right to postpone the payment of the principal depended would have been broken, and the principal would have become exigible, if the defendant had not, before the demand, been served with process of sequestration and attachment by *Boyd's* creditors. We are not prepared to say, nor is it necessary to say, whether, under ordinary circumstances, this would have excused the refusal to pay, so as to save the condition. But it appears that, in the proceedings of sequestration and attachment, the defendant acted either as the counsel or judicial surety of the creditors, and thus himself assisted in creating the interference with the plaintiff's rights. This may have proceeded merely from the desire to know to whom he could with safety pay; but, under the evidence, we would not be permitted to relieve the defendant from the rigorous performance of the contract.

*Judgment affirmed.\**

\*The counsel for the plaintiff submitted the following grounds for a rehearing: We submit that the proper weight has not been given to the injunction, obtained by the plaintiff. The defendant admitted his indebtedness; but pleaded that he was in danger of being disturbed by other persons. If these seizures were set aside, or he was protected, then he was bound to pay. Were not the seizures set aside? They had been enjoined by a competent court. An injunction may not always dissolve the seizure, as, for instance, when the defendant enjoins the sale, leaving the property in the sheriff's hands. But where A. enjoins a levy upon his property to pay the debt of B., then the seizure itself is dissolved. If this be not the effect of an injunction, it would be difficult to say what it means. If a party, whose property has been seized for another's debt, cannot take it out of the sheriff's hands on giving bond, then the greatest oppression would sometimes take place, and the law would afford no remedy. But it is the constant practice of intervenors to take out of the sheriff's hands merchandize attached or seized, on giving bond for its value. What distinction is there between that case and this?

The injunction was granted in the first instance, by the Fifth District court of New Orleans. The decree of the court in that suit, only perpetuates it. If the injunction did not, from the moment it was granted, put an end to the seizure, then does the decree *perpetuating* it have that effect? The nature of the remedy is not altered, by perpetuating it. If the injunction did not dissolve the seizures, they will still be in force, notwithstanding the judgment maintaining the injunction.

The plaintiff was bound, before receiving his money, to protect the defendant from loss. If he was protected by the injunction, then his excuse for not paying was at an end. Was he not protected? Suppose, at the moment the injunction was served upon him, he had paid *Plympton* his money. Would he afterwards have been liable to the seizing creditors on *Plympton's* injunction being dissolved, or would their only recourse have been on the injunction bond? The answer to this question solves the difficulty. He was fully protected, and was bound to pay.

## OAKY V. DRUMMOND.

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The return of a sheriff that he served a copy of the citation and petition on defendant, by leaving them at his domicile in a certain street, in the hands of his wife, a free person above the age of fourteen, does not show a sufficient service under art. 189 C. P. It should have stated the absence of the defendant from home, and that the person with whom the citation was left was living there.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Ben. jamin* and *Micou*, for the plaintiff. *Mott* and *Fraser*, for the appellant. The judgment of the court was pronounced by

ROSE, J. The defendant having failed to answer in this case, the plaintiffs took a judgement by default, which was made final after the legal delays. The defendant has appealed, and assigns, as an error apparent on the face of the record, the want of legal service of the citation, and of a copy of the petition, upon him.

The sheriff's return states that he served a copy of the citation and petition on the defendant, by leaving the same at his domicile in Apollo street, between Clio and Calliope streets, in the hands of his wife, a free person, above the age of fourteen.

This return is insufficient, under art. 189 of the Code of Practice. It should have stated the absence of the defendant from home, and that the person with whom the citation was left was living there. *Kendrick v. Kendrick*, 19 La. 38.

It is, therefore, ordered, that the judgment in this case be reversed, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of this appeal.

## BETTIS et al. v. AMONETT.

The right of the commissioner of the general land office of the United States to vacate

It was one of the grounds of injunction, and it was proved in the record of this case, as well as in the other, that the defendant had himself been active in procuring the very seizures upon which he relied for his defence. That fact precludes him from all equitable claim to the credit originally stipulated. The court says that, he may have considered those steps necessary for his protection; but how could that possibly be? He was aware already of the insolvent proceedings of *Wm. Boyd & Son*. If the proceedings rendered *G. W. Boyd* incapable of transferring, then their existence or pendency was a good defence to plaintiff's demand, and the defendant had only to plead it when attacked. The apprehension of one disturbance cannot be relieved by creating another. But if, on the other hand, the defendant believed that these proceedings prevented a valid transfer; if he really apprehended trouble or annoyance from *them*, why were new proceedings instituted, and why was he active in procuring new seizures?

Again, if *Boyd* was a party to the surrender, then it is obvious that for all his old debts the *stay of proceedings* was in force; consequently the seizure, the attachment, and even the sequestration at the prayer of only a part of the creditors, were all null, and created no *legal* disturbance—gave no reasonable ground of apprehension that the money could be again demanded, if once paid to plaintiff. These proceedings must then have originated, not from the necessity of protecting himself against paying under a transfer, void by the incapacity of the transferer to make it, but only from a desire to create new difficulties.

*Rehearing refused.*

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illegal entries of the public lands, prior to the issuing of a patent, has been repeatedly recognized, and can no longer be questioned.

Where an act of Congress making a donation of public lands to a State, directs the secretary of the treasury of the United States to make the location of these lands, and a resolution of the legislature of the State authorizes the governor to ask for their location, and provides for the contingency of the authority being conferred on him to make the selection, a selection of the lands by the governor, and the acquiescence of the government of the United States in a location made in accordance therewith, will be legal. *Per Cur*: The power of the secretary of the treasury to delegate the authority to designate the lands for location, cannot be doubted.

**A**PPEAL from the District Court of Madison, *Selby, J. Thomas and Snyder*, for the plaintiffs. *Amonett*, for the appellants. The judgment of the court was pronounced by

KING, J. This is a petitory action, instituted for the recovery of a fractional section of land, acquired by the plaintiffs from the State of Louisiana, and for rents from the date of their purchase. The defendant claims under a title emanating originally from the United States, and prays, in the event of eviction, for the value of his improvements. The cause was tried by a jury, who gave the plaintiffs the land claimed, and compensated the value of the improvements with the rents. From a judgment rendered in conformity to this verdict, the defendant *B. F. Amonett, W. Amonett*, the executor of *Slaughter*, and *T. W. Amonett*, have appealed.

The land in controversy was acquired by the State of Louisiana from the United States, under the provisions of the act of the 3d March, 1827, (*Story's U. S. Laws*, p. 2072,) authorizing the secretary of the treasury to locate two townships of land for the use of a seminary of learning, and was sold by the State to the plaintiffs, to whom a patent has been issued.

The selection of a part of the lands authorized by this statute, including the tract claimed by the plaintiffs, was made by the governor of this State, on the 3d July, 1835. Prior to this location the fractional section in dispute was entered by *Shaddoc and Ross*. Their entry, however, was subsequently cancelled by the commissioner of the land office, on the ground that they had failed to establish their right to enter it, and the receiver was authorized to refund the price. Notwithstanding this action of the commissioners, the original purchasers and their vendors have continued to occupy and cultivate the land ever since.

It is contended by the defendant that the sale to *Ross* and *Shaddoc* divested the United States of their title, and that the subsequent designation of this land for the use of a seminary of learning, was illegal and void.

The right of the commissioner to vacate illegal entries of lands, prior to issuing of patent, has been repeatedly recognized, and can no longer be questioned. *Pepper v. Dunlap*, 9 Rob. 288. *Guidry v. Woods*, 19 La. 337.

It is next contended that the act of the 3d of March, 1827, directs the location of the seminary lands to be made by the secretary of the treasury, and that the selection made by the governor of this State was in itself illegal, and has not been since approved.

A resolution of the legislature of this State, passed in 1835, requested the governor to ask for the location of the seminary lands, and provided for the contingency of the authority being conferred on that officer to make the selection. See Acts of 1835, p. 158. That the secretary of the treasury could delegate the authority to designate the lands for location cannot be doubted, and the acquiescence of the general government in the locations which were thus made, and which have been matters of record in the land department for fourteen years, must, in

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the absence of proof of the reverse, be taken as evidence both of the delegation of authority to the executive of this State to make the designation of lands, and of the approval of his acts by the secretary of the treasury. The previous entry of *Ross* and *Shaddoc* having been set aside, the location made by the State of Louisiana was valid.

The plaintiffs have asked that the judgment appealed from be amended, by allowing them rents from the date of their purchase. The jury considered that the improvements made by the defendant were a fair equivalent for the rents, and the testimony upon this point is not such as to authorize us to interfere with their verdict.

*Judgment affirmed.*

### THE BANK OF KENTUCKY v. CONNER et al.

After a *cessio bonorum* by an insolvent, an action to annul a contract made by him in fraud of his creditors cannot be maintained by any creditor individually. It must be instituted by the representative of the creditors. *Aliter*, when there has been no cession. C. C. 190, 1965. Stats. 25 March, 1808; 20 Feb. 1817.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Mott*, for the plaintiffs. *David and Grymes*, for the appellant, *Conner*. The judgment of the court was pronounced by

**EUSTIS, C. J.** On the 6th of May, 1846, a judgment was rendered in the Fifth District Court of New Orleans, in the case of *Sarah Conner*, a free woman of color, against *Theophilus Freeman*, by which it was decreed that the plaintiff was entitled to her freedom, and that the defendant emancipate the said plaintiff according to the formalities required by law.

The president, directors and company of the Bank of Kentucky, alleging themselves to be creditors of the said *Theophilus Freeman*, by virtue of a judgment obtained by them in said court against said *Freeman*, on the 9th of November, 1846, brought their suit against both *Sarah Conner* and *Theophilus Freeman*, for the purpose of annulling this judgment obtained by *Sarah Conner* for her freedom, and subjecting her, as the property of *Freeman*, to execution under their judgment. They obtained a judgment by default, which, on evidence taken, was confirmed. It decreed the judgment of the 6th of May declaring said *Sarah Conner* to be entitled to her freedom to be null and void, and subjected said *Sarah Conner*, as the slave of *Freeman*, to the plaintiff's execution. After an ineffectual attempt to obtain a new trial in the district court, *Sarah Conner* has appealed.

There is no evidence that any steps have been taken by the master of *Sarah Conner* to effect her emancipation under the laws of the State; and we express no opinion as to her condition or *status*, but are only called upon to decide on the validity of the judgment appealed from, as it stands between the parties. If the plaintiffs have no right of action, the judgment cannot be sustained. *Perry v. Goodwin*, 6 Mass. Rep. 498.

Article 190 of the Civil Code provides that an enfranchisement made in fraud of creditors is null and void. By art. 1965, the law gives to every creditor, when there is no cession of goods, as well as to the representatives of all the creditors, when there is any such cession, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights.

BANK OF  
KENTUCKY  
v.  
CONNER.

It appears that, in January, 1844, *Freeman* became insolvent, and subsequently ceded his property to his creditors in the late first judicial district court. The syndic, therefore, of the creditors of *Freeman* is the party competent to institute an action of this kind. By the insolvent acts of 1808 and 1817 judgments confessed by debtors in fraud of creditors may be declared null and void at their instance; and the recourse of the creditors against this alleged fraudulent judgment is direct and obvious, if, in point of fact, it stands in the way of the exercise of their legal rights. But we consider the action by the individual creditors, in this instance, as untenable.

The judgment of the district court is therefore reversed, and the plaintiff's petition dismissed, with costs.

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### LEMOINE v. GARCIA.

No appeal will lie from a judgment overruling a motion to dissolve a sequestration, made by a defendant after he had banded the property sequestered. Such a judgment is not final, nor does it work any irreparable injury.

No appeal will lie from an order refusing to set aside a sequestration, where the question of releasing the property is the only matter for consideration, and the record contains no information as to the value of the property, though the action was on a claim exceeding three hundred dollars.

**A**PPEAL from the District Court of St. John the Baptist, *Nicholls, J. Buisson* and *Maureau*, for the plaintiff. *T. W. Collens*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** The plaintiff caused to be sequestered a quantity of sugar and molasses belonging to the defendant, for the purpose of enforcing a privilege for supplies to the defendant's plantation. A motion was made by the defendant to set aside the sequestration, which failed, the judge decreeing that the privilege and sequestration be maintained and the motion overruled. From this decree the defendant has appealed.

It appears that two writs of sequestration were taken out by the plaintiff, one directed to the sheriff of the parish of St. John the Baptist, and the other to the sheriff of the parish of St. Charles. Under the former writ eighty-five hogsheads of sugar and a quantity of molasses were taken, which were given up on the defendant's giving his bond, with security, as the law directs. Under the writ directed to the sheriff of the parish of St. Charles, forty-three hogsheads of sugar and about five hundred gallons of molasses were seized, but were held subject to two previous sequestrations from the district court. It is obvious that, as to the sugar and molasses sequestered in the parish of St. John the Baptist and given up on the defendant's bond, the appeal is premature, the decree of the district court not being a final judgment, nor one working an irreparable injury. If it be erroneous, the defendant will have his relief on the final judgment of the cause.

As to the sugar and molasses sequestered in the parish of St. Charles, we are not informed as to the value of the property, nor as to the amount for which it is held subject to the previous sequestrations; and *non constat* that the matter in dispute as to this property is of sufficient value to give jurisdiction to this court, on an appeal in relation to it.

On the authority of *Plique v. Belloumé*, 2 An. 293, the appeal in this case must fail, it not being within the jurisdiction of the court.

LEMOINE  
v.  
GARCIA.

*Appeal dismissed.*

### SUCCESSION OF DESTREHAN.

A tutor, appointed under the provisions of sec. 4 of the stat. of 10 March, 1834, on the express condition of his being exempted from giving security, cannot be subsequently required to give security, though the property of the minor, which, at the time of his appointment, consisted chiefly of real estate, has been since converted into money and negotiable paper, for the purpose of affecting a partition.

**A** PPEAL from the District Court of Jefferson, *Clarke, J.* The judgment from which this appeal was taken is in these words:

"A rule was taken on the tutor of the minors *Destrehan*, requiring him to show cause why he should not give security for his administration, and, in default thereof, why his office should not be vacated. The appellant relies on art. 350, C. C. This provision of the Code we think relates only to tutors who are bound by law to give security. The present tutor was appointed under the act of 1834. He holds his office on the express condition that, he shall be dispensed with giving security. This court is without authority to change the terms and conditions on which the office was originally conferred by the law, and accepted by the incumbent. It is therefore ordered that the rule be dismissed." From this judgment, *Rost*, the plaintiff in the rule appealed.

*Roselius*, for the appellant. It is shown that, when the tutor of the minors was dispensed with giving security for the faithful administration of his trust, the property of his wards consisted almost exclusively in their interest in the real estate inherited from their father. Under the state of things then existing, the tutor could only administer this property in conjunction with the heir of age, and receive their share of the revenue yielded by it. But, shortly after his appointment, all the property was sold to effect a partition, and produced \$173,310 30, three fourths of which will go into the possession of the tutor, either in money or negotiable notes.

The question is whether the act of 1834 is to be construed as exempting the tutor from furnishing security for the faithful administration of his trust, no matter what may be the change produced in disposable property or funds in the hands of the tutor? In other words, is the rule in the 330th art. of the Civil Code entirely inapplicable to a tutor who has been appointed under the act of 1834? There is certainly nothing in the language of that law which imperatively requires such an interpretation. Before a tutor can be dispensed with the obligation of giving security a family meeting is to be consulted. Now, on what fact is their advice to be based? Surely on the special circumstances of the case; they must take into consideration the extent of the responsibility which will devolve on the tutor. And can it be seriously pretended that when, as in the present case, that responsibility is comparatively light, at the time the dispensation was granted, such an entire alteration in the state of facts as is shown to have taken place here cannot effect the obligation of the tutor to give security. It is confidently submitted that this is not a sound construction of the law of 1834. The policy of the law is to protect the rights of minors.

*F. B. and C. M. Conrad, contra.* The defendant received his appointment under the provisions of the act of 1834. On the trial of the rule it was shown that, those who had a right to the tutorship declined it, in consequence of the tacit mortgage and of the security they would have been obliged to furnish. These facts were placed before the family meeting, and they recommended to the court the appointment of the defendant without security, under the provisions of

SUCCESSION  
OF  
DESTREHAN.

the 4th section of that act. Here then the case contemplated by that act had occurred. "No one would take upon himself the tutorship and comply with the existing law, by giving security, &c." And accordingly the court, with the advice of the family meeting, nominated "a discreet and responsible person" to be tutor. If no one would give the required security, when the estate, according to the plaintiff's argument, involved comparatively trifling responsibility, this unwillingness to act would certainly exist in a stronger degree when both the responsibility and the security are augmented, and no one would now be found to act as tutor to the minors. The act of 1834 exempted the tutor from giving security, without reference to the estate or condition of the minor. It is an exception to the general principle of art. 330, and after the family meeting and the judge have conferred the appointment, there is nothing in the act authorizing a change in its terms. The plaintiff however goes back to the article of the Code, the language of which is inconsistent with the provisions of the special act; for the latter says, in express terms, that the duties of the tutor shall be the same as required by the existing laws, except as to giving security; while the former, intended only for cases of tutorship in which security had already been furnished, says that "this security may be increased or diminished at the instance &c." It is highly illogical to say that a security, which under the act of 1834 was never given or required, should be increased or diminished.

The judgement of the court, (*Rost*, J. not sitting,) was pronounced by

SLIDELL, J. For the reasons assigned by the district judge it is decreed that the judgment be affirmed, with costs.

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#### COURTADE v. CHAMBERLAIN et al.

The administrator of a succession, being an officer appointed by the court for the discharge of certain duties, must be considered always present in court, like a party to proceedings there pending; and no prescription can commence to run in his favor before the homologation of his account.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Thompson*, for the plaintiff. *W. H. Hunt*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This cause was tried *ex parte*. It is said that a sufficient interval, under the rule of the court, had not elapsed between the time of setting for trial, and the day of trial. It would be with reluctance that we would reverse an interpretation of his own rule by a district judge, except in a very clear case of error; and we will express no opinion on the point, as, on other grounds, we have determined to remand the case.

The object of this action is to impose on the heirs of *Chamberlain*, one of whom is a minor, a responsibility for the gross amount of the inventory of the estate of *Laglaise*, of which *Chamberlain* was appointed administrator, in 1832. After *Chamberlain's* death, the present plaintiff took out, in 1846, letters of administration of *Laglaise's* succession. The heirs of *Chamberlain* answered that he had undertaken the succession merely to protect the interest of one *Borgas*, whose agent he was, and who held a privileged claim sufficient to absorb the succession; that *Chamberlain* was also a creditor of *Laglaise*, for an amount exceeding his gross estate. Interrogatories were propounded to the plaintiff pertinent to the defence.

At the trial of the cause, in the absence of the defendants, the plaintiff offered what it is reasonable to believe are detached portions of the record of *Laglaise's* succession, and not the entire record. The gross inventory was \$469, consisting

of a few articles of merchandize, and various notes for small sums made by several parties. An order of sale was made, upon the suggestion that the property was perishable. The result of the sale does not appear.

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v.  
CHAMBERLAIN.

The judgment given against the heirs of *Chamberlain* upon this evidence, is for the gross amount of the inventory, \$469. If the assets realized that amount, *Chamberlain* would, at least, have been entitled to credit for his commissions.

We are not disposed to shield administrators of estates; but, on the contrary, to scrutinize their acts closely. But looking to the proceedings and evidence in this case as a whole, we cannot divest ourselves of the belief that the judgment is excessive, and that the ends of justice will be promoted by remanding the cause.

With regard to the plea of prescription, we have to remark that it is clearly untenable, so far as the running of prescription during *Chamberlain's* life is claimed. *Chamberlain* was an officer, appointed by the court to discharge certain duties. As such, he must be considered as present before the court, in the nature of a party in proceedings there pending. Prescription had no commencement in his favor, at least, before the homologation of an account. As there is no evidence to establish the date of his death, it is unnecessary to consider what term of prescription would apply in favor of his heirs.

It is decreed, therefore, that the judgment of the court below be reversed, and that this cause be remanded for a new trial; the appellee paying the costs of this appeal.

### GAINES v. THE MERCHANTS' BANK OF BALTIMORE et al.

A judicial sale of all the right, title and interest of a creditor in any further dividend that may be declared among the creditors of an insolvent, is a sale of the debt due to the creditor (C. P. 690, 694); and where the debt was due by a bill or note, which was never in the actual possession of the sheriff, the seizure is invalid, the sale null, and the purchaser may recover back the price paid by him.

To make a valid seizure of a bill or note under a *fi. fa.*, the sheriff must take actual possession of it.

A party seeking to recover back, on the ground of the nullity of the sale, money paid to a judgment creditor as the price of property sold under execution, must pursue the course pointed out by art. 711 C. P., and make the judgment debtor a party to the action; and the judgment obtained against him and the creditor jointly must provide that execution shall be first taken out against the debtor, but, on its being returned unsatisfied, that execution may be issued against the creditor. *Per Curiam*: Art. 711 C. P. relates to the eviction of the purchaser from the thing purchased by him; but it is declaratory of a principle relating to cases where the sale is virtually defeated from other causes.

**A**PPPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Britton and Hamner*, for the plaintiff. *Bonford and T. A. Clarke*, for the appellants. The judgment of the court (*Slidell, J.* not sitting, having been of counsel in the case,) was pronounced by

EUSTIS, C. J. On the 1st of August, 1843, the Merchants Bank of Baltimore caused to be sold, under an *alias fi. fa.*, issued on a judgment against the president, directors and company of the Bank of the United States, all the right, title and interest of said bank in any further dividend that might be declared in the estate of *William Kenner & Co.* The plaintiff became the purchaser, for the sum of one thousand dollars, which he paid to the sheriff. The present suit is to recover back this sum. The president, directors and company of the Bank



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v.  
MERCHANTS'  
BANK.

of the United States have been made parties, by a curator *ad hoc* appointed by the court for that purpose, and judgment was rendered in the district court in favor of the plaintiff; and it was further adjudged that, execution should first issue against the Bank of the United States, and, in case of no property being found on execution issued, that the judgment be satisfied out of the property of the Merchants' Bank of Baltimore. From this judgment both banks have appealed.

It appears that the Merchants' Bank of Baltimore undertook to sell certain assets belonging to the United States Bank, pending the litigation in which they were involved in the memorable suit relating to the validity of the assignment made by that bank, which, upon the final decision, was determined to be valid, except so far as the United States were concerned. This decision defeated the attempt of the Merchants' Bank of Baltimore to reach the assets of the Bank of the United States under their execution.

The ground on which the plaintiff has recovered in the district court is, that the sale under execution was a nullity, and that the plaintiff, who was the purchaser, acquired nothing under it.

The thing sold was the right, title and interest of the bank to the future dividends to be declared in the estate of *William Kenner & Co.*; and the sheriff, in his deed, undertook to convey to the purchaser all the right and title which the bank had to the *said before described property*. The estate of *William Kenner & Co.* was under the administration of a syndic, and the Bank of the United States was its creditor, and we are authorized in assuming that it became so in the ordinary course of its dealings. We infer from the evidence, that the bank was the holder of bills or notes of that firm, on which the dividends received had been duly credited. Under the rule laid down in the case of *Trudeau v. McVicar*, 1 Annual Rep. 426, and under articles 690 and 694 of the Code of Practice, by the description above noted, the debt due by *Kenner & Co.* to the bank was sold, and the title of this debt the purchaser had a right to exact from the sheriff. The evidence does not satisfy us that the sheriff ever took into his possession the obligations of *Kenner & Co.* which the bank held, or any title whatever to said debt.

In the case of *Fluker v. Bullard*, 2 Annual Rep. 338, we held that a sale under a *fi. fa.* of a promissory note, never in the actual possession of the sheriff, confers no title on the purchaser. To make a valid seizure of tangible property, the thing levied upon must be taken into actual possession by the officer. So, where notes, offered in evidence before their maturity, have been withdrawn by permission of the court on leaving certified copies of them in the record, the levying of a *fi. fa.* upon the copies of the notes, and notice to the maker, will not constitute a legal seizure. *Galbraith v. Snyder*, Idem. 492. A bond can be legally seized by the sheriff only by his obtaining actual possession of it. A purchaser at a sheriff's sale, made without a previous seizure, acquires nothing. *Offut v. Monquit*, Idem. 785. To make a valid seizure of a promissory note under a *fi. fa.*, the sheriff must take actual possession of the note. *Taylor v. Stone*, Idem, 910.

However the fact of possession by the sheriff may be, no delivery of the title was ever made by the sheriff to the purchaser, notwithstanding his demand to that effect, and his notice to the sheriff not to pay over the money to the plaintiff until the evidence of the debt should be delivered to him. The good faith of the plaintiff in this transaction being unquestioned, the judgment of the district court against the Merchants' Bank of Baltimore for its recovery back, must be sustained.

This suit grows out of the scramble for the wreck of the assets of the late Bank of the United States of Pennsylvania, and a similar one, instituted by the plaintiff, was before this court on a previous occasion, and is reported in 2 Annual Rep. 280. The judge of the late Commercial Court of New Orleans, from whom the appeal was taken, non-suited the plaintiff, on the ground that the remedy sought by the plaintiff was one of strict right, and that the party seeking to recover back money paid to a judgment creditor, being the proceeds of property sold under execution, ought to pursue the course indicated by article 711 of the Code of Practice, and make the judgment debtor a party to the suit. The Bank of the United States was made a party to this suit, and the district court overruled an exception made by the curator *ad hoc*, that no cause of action was presented in the petition against said bank.

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MERCHANTS'  
BANK.

Article 711 provides that, if the purchaser has been evicted from the thing adjudged to him, on the ground that it belongs to another person than the party in whose hands it was taken, he shall in that case have his recourse for reimbursement against the seized debtor and the seizing creditor; but, upon the judgment obtained jointly for that purpose, the purchaser shall first take execution against the debtor, and upon the return of such execution, no property found, then he shall be at liberty to take out execution against the creditor. This article it is true relates to the eviction of the purchaser from the thing purchased by him; but it is declaratory, as we think, of a principle relating to cases where the sale is virtually defeated from other causes. In the present instance, the money of the plaintiff has been applied directly to the benefit of the Bank of the United States, in part satisfaction of the judgment held by the Merchants' Bank. If the proceedings are regular, satisfaction has been entered on that judgment to the extent of the amount made under execution. On this amount being recovered back by the plaintiff, the satisfaction entered must be rescinded, or a new judgment must be rendered for the amount, of which the Merchants' Bank, on paying back the amount unduly received, are entitled to have the benefit. The Bank of the United States is thus the real party in interest in this litigation; and, we think, the district judge did not err in rendering judgment as prayed for in the original petition.

*Judgment affirmed.*

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| 4   | 371 |
| 117 | 608 |

### CLEMENT, Tutrix, v. STORY et al.

Within the limits of the city of New Orleans, the parties interested may elect in which of the district courts they will open a succession; but when opened in one of the courts, it has the same exclusive power over it as the court of Probates under the late judicial organization. An action for a debt due by the succession can be brought in no other court.

APPEAL from the Second District Court of New Orleans, *Canon, J. A. Hennen*, for the appellants. *L. Peirce* and *Josephs*, for the defendants. The judgment of the court was pronounced by

ROST, J. The petition of the tutrix of the minor heirs of the late *Benjamin Story* alleges that, the mother of said minors died before their father; that her succession was settled in the then court of Probates, and their rights liquidated at the sum of \$20,056 25, for each; and that to secure the payment of these sums their father gave them a mortgage, in favor of the judge of the court of Probates, on immoveable property situated in this city; that another minor heir died shortly after the date of said mortgage, and the petitioners inherited from

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v.  
STORY.

him the sum of \$2,507 03, each; that their father did not invest their funds on interest, as he was bound to do; and that, at his death, he left, besides the petitioners, three heirs of age, who have accepted the succession, purely and simply, and received their portion in the succession of their mother and of their deceased brother. The prayer is that the heirs of age be cited; that they may be ordered to render an account of the estate of the three minors in the successions of their mother and brother; and that they be adjudged to pay the petitioners \$80,000, with interest at the rate of eight per cent per annum from the 21st November, 1845, until paid, and that the property mortgaged may be seized and sold to satisfy this judgment.

The defendants excepted to the petition that, the Second District Court, in which it was filed, was without jurisdiction, all the matters and things put at issue by said petition being now at issue and undecided between the same parties in the Fourth District Court, in the matter of the *Succession of Benjamin Story*, which has been opened there, and also in the suit of *Mrs. Mackie* against the other heirs for a partition of said succession. They further excepted that the Fourth District Court is the only proper tribunal for the settlement of the succession of *Benjamin Story* and all matters pertaining thereto. The judge of the Second District Court sustained these exceptions, and dismissed the petition. The plaintiff has appealed.

There is no error in the judgment. The succession of *Mrs. Story* has been finally settled, and the claims of the minors are debts of the succession of their father, to be settled in the action of partition now pending before the Fourth District Court.

It is urged that the act of 1846, creating the District Courts for the city of New Orleans, confers equal jurisdiction on each of the five courts, and what one can do, each of the others can also do. It is said that the pendency of a suit for partition, does not preclude one of the parties thereto from instituting a personal action against the others for a debt due by the ancestor.

Before the new organization of the judiciary, courts of Probate had exclusive power, with a few exceptions, to decide on claims for money brought against successions administered by curators, testamentary executors or administrators, and to establish the order of privileges, and the mode of payment. They had also exclusive power to regulate all partitions of successions, in which minors were interested, and all actions of partition were to be brought in the court where the succession was opened.

We do not understand that the act of 1846 has repealed that legislation. Within the limits of the city of New Orleans, the parties interested may elect in which of the District courts they will open a succession; but, when one of the courts has been seized with it, it has the same exclusive power over it which pertained to the court of Probates.

*Judgment affirmed.*

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| 4   | 379 |
| 45  | 351 |
| 4   | 272 |
| 48  | 705 |
| 4   | 372 |
| 109 | 499 |

### BAKER et al. v. MORRISON et al.

A return on a *f. fa.* that, it was impossible to make a demand upon the defendant personally and that no property of his could be found, will authorize the plaintiff to proceed against the surety on a bond given to release property which had been sequestered.

Where a sheriff inserts in a sequestration bond a condition not required by law, the condition will not be binding on the surety. The bond must be construed with reference to the law under which it was taken.

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c.  
MORRISON.

The legal intent of a sequestration bond being, under arts. 279, 280 C. P., to secure the delivery of the property to be applied towards the satisfaction of the plaintiff's claim when adjudged, and the penalty of the bond being inserted to secure the performance of that act, the injury sustained by the plaintiff, on a breach of the condition, will be the value of the property sequestered, which, had it been produced, would have been applied to the payment of his claim; but the mere amount of that claim, without reference to the value of the property sequestered, is not the measure of the injury sustained, nor of the liability of the sureties in the sequestration bond.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. I. W. Smith, Labatt and Cohen*, for the plaintiffs. *Hornor*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. Under a sequestration issued in the suit of *Baker et al. v. Doane et al.*, certain moveables were seized, which were restored to the defendant, *Doane*, upon his giving bond, with *Morrison* and *Deacon* as his sureties, in the penal sum of \$2500. The bond recites the levy of the sequestration upon the goods and their restoration to *Doane*, and then states as the condition: "If the said defendant shall not send the above described property out of the jurisdiction of this court, and that he will faithfully present the same in case he should be decreed to restore the same to the plaintiffs, and shall satisfy such judgment as may be rendered in the suit pending as above mentioned, then this obligation to be void; otherwise, to remain in full force."

In that suit the plaintiffs had judgment against *Doane* and his co-defendant *Bossier*, *in solido*, for \$763 83, interest and costs, with privilege on the property sequestered. A *feri facias* was issued, which was returned by the deputy sheriff as follows: "No money, no property found, after demand of both parties."

The plaintiffs then brought this action against the sureties on the bond, claiming judgment for the amount of the judgment against *Doane*, with interest and costs. The petition contained a prayer for general relief. There was judgment for the plaintiffs according to their prayer, and the defendants have appealed.

At the trial of the cause the defendants offered a deputy sheriff to prove that, during the running of the *fi. fa.* against *Doane*, he was absent from the State, which testimony the court rejected, because it went to contradict collaterally the return. The defendants insist that the testimony was admissible, and if received would have established the physical impossibility of a demand upon *Doane*. We deem it unnecessary to determine the question of admissibility; for, if it was physically impossible to make a demand upon *Doane*, upon a return of the writ to that effect, and also that no property could be found, the right to proceed against the surety would have accrued.

The court below erred in condemning the defendants to pay the amount of the prior judgment, interest and costs. It is true that the literal terms of the bond authorized such a decree. But it is properly argued for the defendants that the bond must be construed with reference to the law under which it was given, and that the additional condition inserted by the sheriff is not binding upon the surety. This was expressly held in *Welsh v. Barrow*; and the opinion of Judge Martin in *Boswell v. Lainhart* is to the same effect. The 279th article of the Code of Practice, which grants the right of bonding sequestered property, contemplates a security equivalent to the value of the goods released. Article 280 declares that the surety shall be responsible, that the defendant shall not send the moveables or slaves out of the jurisdiction of the court: that he shall not make an improper

BAKER  
v.  
MORRISON.

use of them, and that he will faithfully present them after definitive judgment, &c. A marked difference exists in the provisions of the Code in cases of attachment. There the bond is, "that he [the defendant] will satisfy such judgment as may be rendered against him in the suit pending." Art. 259.

The legal intent of the instrument being to secure the presentation of the property to be applied towards the satisfaction of the plaintiffs' privilege when definitively adjudged, and the penalty of the bond being inserted to secure the performance of that act, upon breach of the condition, the question is, *quantum damnificatus*. The injury sustained by the plaintiffs is the value of the sequestered property, which, if it had been presented, would have been applied to the payment of the plaintiffs' claim. A judgment resting upon the mere standard of the amount of the plaintiffs' claim, without reference to the value of the property sequestered, is, therefore, erroneous.

As we have no evidence of the value of the property, the suit must be dismissed. Under the express terms of the bond the sureties are liable *in solido*.

It is, therefore, decreed that, the judgment of the court below be reversed, and that this cause be dismissed as in case of non-suit; the plaintiffs paying the costs in both courts.

### DARDEN v. NOLAN.

Decision in *Youngblood v. Dodd*, 2 An. 187, affirmed.

**A**PPEAL from the District Court of West Baton Rouge, *Nicholls, J. Heron*, for the plaintiff. *Lobdell and Greves*, for the appellant. The judgment of the court was pronounced by

**KING, J.** The plaintiff claims in this action his wages, as an overseer, on the plantation of the defendant, for the months of November and December, 1846. He also claims twelve hundred dollars on a written agreement, by which the defendant stipulated to employ him as an overseer for the year 1847, averring that he was discharged by the defendant, on the 1st of January of that year, without just cause. The defendant admits the alleged agreement, but avers that he dismissed the plaintiff in consequence of abusive language and menacing gestures used by the latter to him, as well as for negligence and misconduct as an overseer. The jury awarded to the plaintiff the sum claimed in his petition, and the defendant has appealed.

We are unable to concur with the jury, and are constrained to reverse their verdict. The evidence shows that the plaintiff used the most grossly abusive and insulting language to the defendant, accompanied with a threatening manner, which was not provoked by the latter, as far as appears from the record. After the violent altercation which occurred between the parties, in which they indulged in mutual recriminations, it was impossible that the relations of employer and overseer could longer continue, and we find nothing in the evidence to authorize the conclusion that this result was produced by the fault of the defendant. We think that the defendant was fully justified in discharging the plaintiff. *Youngblood v. Dodd*, 2 An. 187. *Conrey v. Brandegee*, 2 An. 132.

For the month of December, and a part of the month of November, during

which the plaintiff rendered services as overseer under a separate contract, he is entitled to the wages stipulated.

The judgment of the District Court, is therefore reversed; and it is decreed that the plaintiff recover of the defendant the sum of one hundred and twenty-five dollars; the plaintiff paying the costs of this appeal, and the defendant those of the court below.

DARDEN  
v.  
NOLAN.

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MAILLEFER v. SAILLOT.

Where, after a judgment rendered on the opposition of the tutor, rejecting the application of a minor, under the stat. of 23 January, 1829, to be emancipated before attaining the age of twenty-one years, the minor marries without the knowledge or consent of his tutor in another State, the marriage will not have the effect of emancipating him, nor will it authorize him to demand an account and settlement of the tutorship. Art. 367 C. C. which provides that the tutor is emancipated of right by marriage, relates to marriages authorized by law, not to those contracted in fraud of its provisions.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J. Biron* and *T. W. Collens*, for the plaintiff. *Castera*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiff, being at the time over nineteen years of age, applied to the district court to be dispensed with the age required by law for attaining majority, under the act of 1829. The family meeting convoked to take his application into consideration advised the judge to grant it; but the tutor opposed it; and, after hearing evidence, the court gave the following judgment: "The testimony shows that the applicant is unable to manage his own affairs, and that he is unwilling to work. We think that the tutor's opposition must be maintained, and the costs paid by the minor."

After the rendition of this decree the plaintiff went to the city of Mobile and there married, without the knowledge or consent of his tutor, and immediately returned to institute the present action, in which he calls upon the defendant to account and pay over to him the funds which he holds as tutor, on the ground that he has been emancipated by marriage. The defence is: 1st. That the plaintiff, having married without the consent of his tutor, has no right to compel him to account until he attains the age of twenty-one years. 2d. That the judgment which refused the plaintiff his emancipation, on the ground of incapacity to manage his own affairs, has never been appealed from, and is final against him.

There was judgment in favor of the plaintiff ordering the tutor to account. The defendant took a devolutive appeal, and, under reservation of it, rendered his account, which was homologated, and the balance ordered to be paid to the plaintiff. The defendant also appealed from this decree.

We are of opinion that the district court erred, and that the disposition of the Code which provides that minors are emancipated by marriage, means the marriages which the law authorizes, not those which are made in fraud of its provisions. It appears to us that the plaintiff's marriage in the State of Alabama can no more affect the judgment rejecting his application for emancipation, than any other form of emancipation obtained in that State would affect it.

Through motives of public policy, the law does not pronounce the nullity of marriages thus contracted; but it is equally against public policy that they should

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b, held to confer upon the parties all the rights which result from the marriages of minors legally authorized.

It is ordered that, the judgment in this case be reversed, and the plaintiff's petition be dismissed, with costs in both courts.

### THE STATE v. BAILEY.

Where, after the evidence had been concluded in a prosecution for murder, the attorney for the State states to the judge, out of the hearing of the jury, that no case had been made, out against the prisoner, but makes no offer to discontinue and the court, taking a different view of the evidence, communicates the opinion of the prosecuting attorney to the jury, the court cannot be required to charge the jury that they were bound to acquit the prisoner in consequence of a virtual abandonment of the prosecution. The jury should be charged that, they were not bound by the opinion of the prosecuting officer, but were bound to examine the case and decide according to their oaths. *Per Curiam*: Without a proposition on the part of the State, assented to by the prisoner, the issue had necessarily to be submitted to the jury; and, when thus submitted, they, and not the prosecuting officer, were the judges of the guilt or innocence of the accused.

The opinions of medical men, examined as witnesses in a prosecution for murder, as to the cause of the death, are not conclusive upon the jury. Their testimony must be weighed by the jury, as other evidence.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Sever*, for the appellant. The judgment of the court was pronounced by

KING, J. The defendant was convicted of murder, and has appealed from the judgment of the lower court given thereon. The grounds on which he asks a reversal of the judgment and a new trial, are presented in a bill of exceptions taken to the refusal of the judge to charge the jury as requested on the trial. The bill of exceptions is as follows:

"Be it remembered that, on the trial of this cause, while his honor, the judge, was charging the jury, he informed the jury that the attorney general had expressed to him the opinion that no case had been made out by the evidence against the defendant, and that he could not therefore urge a conviction by the jury; whereupon the counsel for the defendant asked his honor the judge, to charge the jury, that, inasmuch as the attorney general had expressed, and his honor had communicated to the jury, the opinion aforesaid, his honor was bound by law to charge the jury that they were bound to acquit the prisoner, the law officer of the State having virtually abandoned the prosecution; but the judge refused to charge as requested, and, on the contrary, charged the jury that they were not bound by the aforesaid opinion of the attorney general, but that it was their duty to examine the case irrespective of said opinion. To which refusal to charge as aforesaid requested, and to the said charge as given by his honor, the counsel for the defendant then and there excepted. And, moreover, the counsel of defendant asked his honor to charge the jury, that they were bound by the opinion as to the cause of the death of the deceased, as testified to by the physicians who gave their evidence on the trial; but the judge refused to charge as requested, but charged that they were bound to consider the whole evidence. To which refusal the said counsel then and there excepted, and tendered this bill of exceptions for signature.

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*By the Court:* The communication made to the court by the attorney general was not made in the hearing of the jury, and the court does not suppose that the attorney general expected that his opinion, given in this manner, would have been made known to the jury. The court, taking a different view of the case, felt that it was justice to the prisoner that the opinion of the attorney general should be made known: the court, therefore, charged the jury to take the case under consideration, and decide according to the oaths they had taken as jurors."

The district judge did not, in our opinion, err, in his instructions to the jury. The attorney general made no motion to discontinue the prosecution. He declined urging a conviction, and so informed the court, but still permitted the prosecution to proceed. The judge, on whose mind the evidence had produced a different impression, with all fairness communicated to the jury the opinion of the attorney general, and thus gave the prisoner the full benefit of that opinion. He left the case where the attorney general had left it, to the consciences of the jury, to be determined upon the testimony; and could not have done otherwise with the impressions which that testimony had made upon his mind. Without a proposition on the part of the State, and assented to by the prisoner, the issue had necessarily to be submitted to the jury; and, when thus submitted, they, and not the prosecuting officer, were the judges of the guilt or innocence of the accused.

The second point presented by the bill of exceptions is untenable. The general rule of evidence is that, witnesses can only testify to facts within their knowledge. An exception to the rule permits medical men to give their opinions in evidence on questions depending upon professional skill. But those opinions are not conclusive. They are to be weighed, as other evidence, by the jury, as the district judge properly charged. 1 Greenleaf on Ev. § 440. *Brabo v. Martin*, 5 La. 276.

*Judgment affirmed.*

### YORK v. CHILTON.

In an action for damages for an illegal arrest, if no probable cause be shown for the arrest, malice on the part of the person at whose instance it was made will be presumed.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Frost and J. Barker*, for the appellant. *Winthrop*, for the defendant. The judgment of the court was pronounced by

**EUSTIS, C. J.** This is an action by the plaintiff, who was the master of the british barque *Aldebaran*, against the defendant, growing out of the alleged agency of the defendant in removing the plaintiff from his command, in the port of New Orleans, in the month of April, 1845. The plaintiff claims ten thousand dollars damages. There was a general verdict for the defendant, and the plaintiff has appealed. The case stands before us for consideration, under certain bills of exception taken to the rejection of evidence offered on the trial of the cause.

The district judge was of opinion that certain points of law which this case presented, had been determined by this court in the case of *Barker v. York*, 3 An. Rep. 90, and acted upon this construction of our decision in his refusal to admit the evidence. That suit was instituted by *Barker*, an attorney and counsellor at law, against the owners of the barque *Aldebaran*, for professional



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services alleged to have been rendered to them on the removal of captain York from the command of the *Aldebaran*. We came to the conclusion, that the services alleged to have been rendered to the owners were not proved, and affirmed the verdict of the jury, which was for the defendant. The claims of the plaintiff for damages against the present defendant, we consider entirely unaffected by anything decided in the suit of *Barker*; and that all the questions both of law and fact are open for enquiry.

We are not at all surprised at the error into which our learned brother has, we think, fallen, when we consider the manner in which these cases have both been presented, as appears by the records; and the only mode by which any legal principles can be properly applied to this case is, by leaving entirely out of view everything which is irrelevant to it, and placing the causes of action of the plaintiff in legal and proper form. We suppose they may be reduced to these heads: The acts of the defendant, in depriving the plaintiff of the possession, custody and command of the *Aldebaran*, and his confederating with others for that purpose, depriving him of certain articles of personal property, interfering with his authority as master, and exciting the crew of the vessel to disobedience and mutiny, slandering and calumniating him, injuring him by these acts, and impairing his standing as a shipmaster and his character as a man, and causing him to be arrested and imprisoned under the process of the recorder of the Third Municipality. These appear to be the substance of the injuries for which the plaintiff seeks redress from the defendant; they are charged in the petition with sufficient forms of aggravation and wrong to cover almost any evidence that can support them. No exception has been taken to their cumulation in the same action, nor to the manner in which they are charged. On reducing the defendant's pleas and answers to their legal form, they may be considered as tendering the general issue, and a justification of the acts of the defendant, under the authority of the District Court of the United States, of her Britannic Majesty's consul in New Orleans, and of the owners of the barque *Aldebaran*, and as alleging gross misconduct on the part of the plaintiff in the command of the barque, thereby endangering the safety and the interest of the owners.

The district judge confined the evidence of the plaintiff to the taking of a chronometer, alleged to belong to the defendant, and to the false imprisonment charged in the petition; considering all the other matters as being disposed of by this court in the case of *Barker*, and by the decision of the district court of the United States on a libel filed by the defendant against the barque *Aldebaran*. We are of opinion that the court erred in so restricting the plaintiff's evidence, and that all relevant testimony, under the issues as stated, ought to have been received, and was not precluded by the decision in those cases. In relation to the proper testimony to be received under them, we have no reason to believe that any difference of opinion can exist between this court and the district court; and therefore consider that there is no necessity of going into details in relation to it. We can state, however, in general terms, that the depositions of the witnesses offered, and the record of the suit in the district court of the United States, ought to be admitted in evidence; and that the sailing orders to the plaintiff are not inadmissible. The same may be said of the bills of lading offered. The admission of both may be proper, at a certain stage of the cause. The bill of parcels for the chronometer offered by the defendant, not having been proved, we consider ought not to have been received in evidence.

There is a bill of exceptions to the charge of the judge, in relation to the

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rest of the plaintiff, at the instance of the defendant, under process from the recorder's court. We think the judge in this case ought to charge the jury that, if there appear no probable cause for the arrest of the plaintiff, there is a presumption of malice on the part of the person at whose instance it was made.

We are not aware of anything else in this case which requires our attention, and remand it with the hope that it may be closed by the judicious verdict of a jury, whose peculiar province it is to terminate questions of damages of this nature.

It is therefore decreed that the judgment of the District Court be reversed, and the case remanded for a new trial, with directions to the judge to act on the matters embraced in this opinion as therein laid down; and it is further ordered that the appellee pay the costs of this appeal.

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### THE STATE v. HERNANDEZ.

Where a prisoner, on being brought to the bar, declares that he is ready for trial, and accepts the jurors summoned to pass upon the charges preferred against him, he cannot afterwards object that a copy of the indictment was not served upon him.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *J. M. Wolfe*, for the appellant. The judgment of the court was pronounced by

KINS, J. The accused was convicted of counterfeiting silver coin current in the State, and, after sentence, appealed. No bills of exception were taken upon the trial of the cause. The accused relies for a reversal of the judgment of the lower court on a number of alleged errors, assigned as apparent on the face of the record. They are the following: 1st. That there is no statute declaring it an offence to counterfeit coin within this State, and the offence as charged in the indictment is not in the words of any statute relating to the counterfeiting of coin. 2nd. That it does not appear from the record that the defendant was served with a copy of the indictment, two days previous to the trial; nor that the grand-jury was drawn as required by law, nor of whom it was composed; nor that the accused was defended by counsel.

I. It appears to have escaped the attention of counsel that the accused was indicted under the 13th sec. of the act of 1818 (B. and C.'s Dig. p. 264); and that the offence is charged literally, in the words of the statute.

II. The defendant has brought before us a record defective in many respects, and exhibiting some of the proceedings connected with the drawing and empanelling of the grand-jury. He cannot expect us to give him the benefit of his own *laches*, and to presume that the proceedings of the lower court have been irregular. If he had reason to complain of the drawing or composition of the jury, he should have brought before us a complete record, exhibiting any irregularities which may exist in the proceedings to his prejudice.

When the accused was brought to the bar, he declared himself ready for trial, and accepted the jurors who were to pass upon the charges preferred against him. This was a waiver of a copy of the indictment, if indeed one had not been previously served upon him. Whether or not the prisoner was defended by counsel does not appear; but there is nothing to show that he made an ineffectual application to the court to assign him counsel.

*Judgment affirmed.*

## THE STATE v. MONASTERIO.

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No appeal will lie from a judgment, sentencing one prosecuted under the stat. of 2d April, 1832, for selling intoxicating liquors to a slave without the consent of his master, to forfeit any license held by him, and to be forever deprived of the right of holding such a license in future, and condemning him to pay a fine of three hundred dollars and the costs of prosecution, or to remain in jail until such fine and costs, and jail fees are paid, for a term not exceeding six months. *Per Cur.* The fine is not sufficient to give jurisdiction; the forfeiture gives no jurisdiction of itself, nor can it aid the deficiency of the fine in that respect; and the costs, being matters of course, can have no such effect.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Budd*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** The defendant has appealed from a judgment of the First District Court of New Orleans, by which he was, after conviction, sentenced, for the offence of selling liquors to slaves, to forfeit any license or licenses he may hold under any authority of this State, and to be forever deprived of the right of obtaining and holding any such license, and was further sentenced to pay a fine of three hundred dollars, and the costs of prosecution, which fine, together with the jail costs, was to be paid into the hands of the sheriff immediately in open court after judgment, and, in default thereof, to be arrested and conveyed to jail, there to remain until said judgment be satisfied and the jail fees paid, or for a term not exceeding six months. This prosecution was under the act of 2d April, 1832, entitled "*An act more effectually to prevent slaves from obtaining spirituous or intoxicating liquors, without the consent of their masters.*"

The attorney general has moved to dismiss the appeal, on the ground that this court cannot take cognizance of it, because the fine imposed does not exceed three hundred dollars.

The proceedings against the defendant were by information in the name of the State, for the offence committed, and were criminal and not civil proceedings. The jurisdiction of this court is limited on criminal cases to questions of law alone, whenever the punishment of death or hard labor is inflicted, or when a fine exceeding three hundred dollars is actually imposed. Con. article 63.

The fine imposed is not of an amount sufficient to give the court jurisdiction. The forfeiture gives no jurisdiction of itself, nor can it aid the deficiency of the fine in that respect. The costs, being matters of course, after conviction can have no such effect, under the definite and positive limitation of the constitution.

*Appealed dismissed.*

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 CLEMENTS v. CASSILLY et al.

Where, in a bond executed for the release of property attached, three persons are named as principals, but the bond is signed by but one of the principals and a surety, the latter will not be bound, in the absence of evidence to destroy the presumption that he expected the three persons named as principals to be bound as such, or to show that he would have any recourse against them, if he paid the amount.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Perrin and Finney*, for the appellant. *Conklin and Mott*, for the defendants. The judgment of the court was pronounced by

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SLIDELL, J. An attachment having been levied upon the property of the defendant, a bond was given to release it, which was signed by *Fullerton*, as surety. *Cassilly, Wooden and Babcock* were named as the principals in the bond, but *Wooden* was the only one of the principals who signed. Judgment having been rendered against *Wooden* alone, and a *feri facias* having been taken out against him without success, a rule was taken against *Fullerton* to show cause why he should not be condemned to pay the amount of the judgment. The district judge discharged the rule, and the plaintiff has appealed.

We are of opinion that the surety is not bound upon this bond, *Cassilly and Babcock*, the proposed principals, not having signed it; and there being no evidence to show that the surety would have any recourse against them if he paid the money, or to destroy the presumption that he expected them to be bound as principals. See *Wood v. Washburn*, 2 Pick. 24. *Bean v. Parker*, 17 Mass. 591.

*Judgment affirmed.*

### McMASTERS v. PALMER.

Pleas in reconvention must be set forth with the same certainty, as to amounts, dates &c., as if the party opposing them were plaintiff in a direct action.

Where evidence in support of a reconventional demand has been illegally received, though excepted to on the ground of its inadmissibility on account of the vagueness and uncertainty of the plea in reconvention, the court of the first instance cannot deprive the party of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make any showing contradictory of the evidence so received.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Van Dalson*, for the appellant. *Remy and Soulé*, for the defendant. The judgment of the court was pronounced by

ROST, J. The defendant was the banker of the plaintiff, who now sues for \$300, the alleged balance in his favor of their general account, which he annexes to his petition. The defendant denied his being in any manner indebted to the plaintiff; and alleged that, on the contrary, at the time specified in the petition as the period when the discount business to which it alluded terminated, the balance, instead of being against the defendant, was in his favor, for a sum exceeding \$2,400. He prays for a judgment in reconvention. The plaintiff excepted to the plea in reconvention on the ground that it is too vague and uncertain, and should have been set forth with certainty as to amount and date. The court did not act on this exception, but, on the trial of the cause, when the defendant offered in support of his claim in reconvention three checks of his own to the order of the plaintiff, which it is admitted the bank paid him, the said plaintiff opposed their admission as evidence, on the grounds alleged in his exception. This opposition was overruled by the court, and he took a bill of exceptions. The court proceeded to try the cause, and gave judgment in favor of the defendant in reconvention, for \$2,050.

The plaintiff moved for a new trial, on the grounds alleged in his bill of exceptions, and further on the ground that the judgment is contrary to, or at least unsupported by, evidence, because the checks admitted by the court to prove the recon-

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ventional demand do not raise a presumption of indebtedness of the plaintiff to the defendant.

The district judge stated, in refusing the new trial, that he had admitted the defendant's checks in evidence as items to his credit, in addition to the items placed to his credit in the plaintiff's account. He further stated that, at the time of rendering the judgment, he had told the plaintiff's counsel that if he would make any showing that these checks did in reality refer to other transactions than those embraced in the account, he would grant a new trial; no showing having been made the new trial was refused, and the plaintiff took the present appeal.

Under the uniform jurisprudence of this court, the exception of the plaintiff was well taken, and should have been sustained. The plea in reconvention was too vague and uncertain, and the defendant should not have been permitted to offer evidence under it. *Pargoud v. Grice*, 6 La. 75. *White v. Moreno*, 17 La. 372. *Jonau v. Ferrand*, 2 Rob. 216. *Wilcox v. His Creditors*, 11 Rob. 347. 5 La. 450. The court could not deprive the plaintiff of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make a showing contradictory of the evidence already received.

It is true, as urged by the plaintiff, that the mere paying over of money, or of a bank check, by a party to another, is not, as a general rule, presumptive evidence of a loan. But as the checks on which the defendant relies are not properly before us, we are unable to determine whether the defendant has brought himself within any exception to that rule.

Taking into consideration the previous connection in business of the parties and the object of this suit, we believe that the ends of justice will be promoted by remanding it.

It is, therefore, ordered that, the judgment in this case be reversed, and the case remanded for further proceedings, according to law, and in conformity with the rules laid down in the foregoing opinion; the defendant and appellee paying the costs of this appeal.

### THE UNION BANK OF LOUISIANA v. GUILLOTTE.

Where the report made by a sworn surveyor, appointed by the court having cognizance of an action of boundary, is defective, and the plan annexed to it is not in conformity with the titles, the report should be rejected and a new survey ordered. C. C. 837. The surveyor is but an expert, and his operations are always under the control of the court. The defectiveness of the report is no ground for non-suiting the plaintiff.

**A** PPEAL from the District Court of Jefferson, *Clarke, J. Denis*, for the appellants. *Soulé*, for the defendant. The judgment of the court was pronounced by

**ROSE, J.** This is an action of boundary, and for the removal of certain fences erected around property alleged to belong to the plaintiffs. The prayer of the petition is that surveyors be appointed to inspect the adjacent estates, and report according to the titles of the parties; that the boundary lines between said estates be fixed, so as to divide proportionally the over extent of land found in the original tract of which these estates are parcels. There is also a prayer that the fences complained of be removed. The defendant has joined the plaintiffs in the prayer that surveyors be appointed to examine the premises in dispute, and report; but he

denies the allegations in the petition having a tendency to establish the dividing line of the property held by them at the point therein specified. He further avers that the fences complained of do not cover the lines of the lots sold to him by the Ursuline Nuns, in 1811.

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An order of survey was granted by the court, and a commission issued to *Louis Bringier*, a sworn surveyor of the State, who made a survey and report, in all respects favorable to the pretensions of the defendant. The district judge being of the opinion that the survey was not made in conformity with the titles of the parties, and that the surveyor should have ascertained the location of the fixed boundary called for by the defendant's title, rejected both the survey and the report; and being farther of opinion that, in actions of boundary, art. 829 of the Civil Code imperatively requires the limits to be fixed by a sworn surveyor, and that, without the report of the surveyor duly homologated, no judgment can be rendered, he non-suited the plaintiffs. Both parties have appealed, and ask that the case be considered on its merits.

We are of opinion that the district judge erred, in dismissing the petition. The article of the Code declaring that limits in actions of boundary must be fixed by a sworn surveyor of the State, is to be taken in connection with art. 837, which makes it the duty of the judge in those cases to appoint surveyors to inspect the premises, and to decide on their report, according to the titles of the parties and the plans which shall be presented to the court. If the reports thus made are defective, and the plans annexed to them not in conformity with the titles, the court ought to reject them, and order a new survey to be made according to law. The surveyor is but an expert; and his operations are always under the control of the court.

Before going into an examination of the merits of this case, it is necessary to state the facts upon which it rests. In 1810, the *Ursuline Nuns* divided their plantation adjoining *faubourg Annunciation*, into eleven lots, numbered from one to eleven, and caused a plan of this division to be made and deposited in the office of *N. Broutin*, a notary public of this city. On this plan two streets called St. Andrew's road and Felicite road were laid out at the side lines of the plantation; a third street called St. Mary's road was opened through the middle of it, and extended in the rear until it reached lot no. 1, which remained undivided, and included all the rear of the plantation. All these streets converged from the front to the rear of the plantation. Shortly after this division the *Nuns* sold to *Teinturier* the lot no. 1, measuring 522 feet 6 inches front on the side of the river, 900 feet on the side of the widow *Panis*, and 1078 feet on the side of and adjacent to the suburb Annunciation, being, says the sale, part of the plantation which the *Nuns* have divided into lots, in conformity to the plan deposited in the office of *N. Broutin*. After this sale, to wit, on the 21st. of October, 1811, the defendant purchased from the *Nuns* two parcels of ground, one situated within the lines of lot no. 2, in the plan of the faubourg, measuring 239 feet 6 inches front to the road which divided it from the property acquired by *Teinturier*, and 300 feet in depth and front on St. Andrew's and St. Mary's roads; the other situated within the lines of lot no. 3, and measuring 250 feet front on said road along *Teinturier's* property, and 300 feet in depth and front on St. Mary's and Felicite roads. On the 9th of December, 1811, the defendant purchased from the *Nuns* two other parcels of ground situated in the same lots, nos. 2 and 3, contiguous to the land already acquired by him, and extending from the rear lines of said land 300 feet front on St. Andrew's, St. Mary's and Felicite roads. The

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The district judge stated, in refusing the new trial, that he had admitted the defendant's checks in evidence as items to his credit, in addition to the items placed to his credit in the plaintiff's account. He further stated that, at the time of rendering the judgment, he had told the plaintiff's counsel that if he would make any showing that these checks did in reality refer to other transactions than those embraced in the account, he would grant a new trial; no showing having been made the new trial was refused, and the plaintiff took the present appeal.

Under the uniform jurisprudence of this court, the exception of the plaintiff was well taken, and should have been sustained. The plea in reconvention was too vague and uncertain, and the defendant should not have been permitted to offer evidence under it. *Pargoud v. Grice*, 6 La. 75. *White v. Moreno*, 17 La. 372. *Jonau v. Ferrand*, 2 Rob. 216. *Wilcox v. His Creditors*, 11 Rob. 347. 5 La. 450. The court could not deprive the plaintiff of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make a showing contradictory of the evidence already received.

It is true, as urged by the plaintiff, that the mere paying over of money, or of a bank check, by a party to another, is not, as a general rule, presumptive evidence of a loan. But as the checks on which the defendant relies are not properly before us, we are unable to determine whether the defendant has brought himself within any exception to that rule.

Taking into consideration the previous connection in business of the parties and the object of this suit, we believe that the ends of justice will be promoted by remanding it.

It is, therefore, ordered that, the judgment in this case be reversed, and the case remanded for further proceedings, according to law, and in conformity with the rules laid down in the foregoing opinion; the defendant and appellee paying the costs of this appeal.

### THE UNION BANK OF LOUISIANA v. GUILLOTTE.

Where the report made by a sworn surveyor, appointed by the court having cognizance of an action of boundary, is defective, and the plan annexed to it is not in conformity with the titles, the report should be rejected and a new survey ordered. C. C. 837. The surveyor is but an expert, and his operations are always under the control of the court. The defectiveness of the report is no ground for non-suiting the plaintiff.

**A** PPEAL from the District Court of Jefferson, *Clarke, J. Denis*, for the appellants. *Soulé*, for the defendant. The judgment of the court was pronounced by

**ROST, J.** This is an action of boundary, and for the removal of certain fences erected around property alleged to belong to the plaintiffs. The prayer of the petition is that surveyors be appointed to inspect the adjacent estates, and report according to the titles of the parties; that the boundary lines between said estates be fixed, so as to divide proportionally the over extent of land found in the original tract of which these estates are parcels. There is also a prayer that the fences complained of be removed. The defendant has joined the plaintiffs in the prayer that surveyors be appointed to examine the premises in dispute, and report; but he

denies the allegations in the petition having a tendency to establish the dividing line of the property held by them at the point therein specified. He further avers that the fences complained of do not cover the lines of the lots sold to him by the Ursuline Nuns, in 1811.

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An order of survey was granted by the court, and a commission issued to *Louis Bringier*, a sworn surveyor of the State, who made a survey and report, in all respects favorable to the pretensions of the defendant. The district judge being of the opinion that the survey was not made in conformity with the titles of the parties, and that the surveyor should have ascertained the location of the fixed boundary called for by the defendant's title, rejected both the survey and the report; and being farther of opinion that, in actions of boundary, art. 829 of the Civil Code imperatively requires the limits to be fixed by a sworn surveyor, and that, without the report of the surveyor duly homologated, no judgment can be rendered, he non-suited the plaintiffs. Both parties have appealed, and ask that the case be considered on its merits.

We are of opinion that the district judge erred, in dismissing the petition. The article of the Code declaring that limits in actions of boundary must be fixed by a sworn surveyor of the State, is to be taken in connection with art. 837, which makes it the duty of the judge in those cases to appoint surveyors to inspect the premises, and to decide on their report, according to the titles of the parties and the plans which shall be presented to the court. If the reports thus made are defective, and the plans annexed to them not in conformity with the titles, the court ought to reject them, and order a new survey to be made according to law. The surveyor is but an expert; and his operations are always under the control of the court.

Before going into an examination of the merits of this case, it is necessary to state the facts upon which it rests. In 1810, the *Ursuline Nuns* divided their plantation adjoining *faubourg Annunciation*, into eleven lots, numbered from one to eleven, and caused a plan of this division to be made and deposited in the office of *N. Broutin*, a notary public of this city. On this plan two streets called *St. Andrew's road* and *Felicité road* were laid out at the side lines of the plantation; a third street called *St. Mary's road* was opened through the middle of it, and extended in the rear until it reached lot no. 1, which remained undivided, and included all the rear of the plantation. All these streets converged from the front to the rear of the plantation. Shortly after this division the *Nuns* sold to *Teinturier* the lot no. 1, measuring 522 feet 6 inches front on the side of the river, 900 feet on the side of the widow *Panis*, and 1078 feet on the side of and adjacent to the suburb *Annunciation*, being, says the sale, part of the plantation which the *Nuns* have divided into lots, in conformity to the plan deposited in the office of *N. Broutin*. After this sale, to wit, on the 21st. of October, 1811, the defendant purchased from the *Nuns* two parcels of ground, one situated within the lines of lot no. 2, in the plan of the faubourg, measuring 239 feet 6 inches front to the road which divided it from the property acquired by *Teinturier*, and 300 feet in depth and front on *St. Andrew's* and *St. Mary's* roads; the other situated within the lines of lot no. 3, and measuring 250 feet front on said road along *Teinturier's* property, and 300 feet in depth and front on *St. Mary's* and *Felicité* roads. On the 9th of December, 1811, the defendant purchased from the *Nuns* two other parcels of ground situated in the same lots, nos. 2 and 3, contiguous to the land already acquired by him, and extending from the rear lines of said land 300 feet front on *St. Andrew's*, *St. Mary's* and *Felicité* roads. The



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ventional demand do not raise a presumption of indebtedness of the plaintiff to the defendant.

The district judge stated, in refusing the new trial, that he had admitted the defendant's checks in evidence as items to his credit, in addition to the items placed to his credit in the plaintiff's account. He further stated that, at the time of rendering the judgment, he had told the plaintiff's counsel that if he would make any showing that these checks did in reality refer to other transactions than those embraced in the account, he would grant a new trial; no showing having been made the new trial was refused, and the plaintiff took the present appeal.

Under the uniform jurisprudence of this court, the exception of the plaintiff was well taken, and should have been sustained. The plea in reconvention was too vague and uncertain, and the defendant should not have been permitted to offer evidence under it. *Pargoud v. Grice*, 6 La. 75. *White v. Moreno*, 17 La. 372. *Jonau v. Ferrand*, 2 Rob. 216. *Wilcox v. His Creditors*, 11 Rob. 347. 5 La. 450. The court could not deprive the plaintiff of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make a showing contradictory of the evidence already received.

It is true, as urged by the plaintiff, that the mere paying over of money, or of a bank check, by a party to another, is not, as a general rule, presumptive evidence of a loan. But as the checks on which the defendant relies are not properly before us, we are unable to determine whether the defendant has brought himself within any exception to that rule.

Taking into consideration the previous connection in business of the parties and the object of this suit, we believe that the ends of justice will be promoted by remanding it.

It is, therefore, ordered that, the judgment in this case be reversed, and the case remanded for further proceedings, according to law, and in conformity with the rules laid down in the foregoing opinion; the defendant and appellee paying the costs of this appeal.

### THE UNION BANK OF LOUISIANA v. GUILLOTTE.

Where the report made by a sworn surveyor, appointed by the court having cognizance of an action of boundary, is defective, and the plan annexed to it is not in conformity with the titles, the report should be rejected and a new survey ordered. C. C. 837. The surveyor is but an expert, and his operations are always under the control of the court. The defectiveness of the report is no ground for non-suiting the plaintiff.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Denis*, for the appellants. *Soult*, for the defendant. The judgment of the court was pronounced by

*Rost, J.* This is an action of boundary, and for the removal of certain fences erected around property alleged to belong to the plaintiffs. The prayer of the petition is that surveyors be appointed to inspect the adjacent estates, and report according to the titles of the parties; that the boundary lines between said estates be fixed, so as to divide proportionally the over extent of land found in the original tract of which these estates are parcels. There is also a prayer that the fences complained of be removed. The defendant has joined the plaintiffs in the prayer that surveyors be appointed to examine the premises in dispute, and report; but he

denies the allegations in the petition having a tendency to establish the dividing line of the property held by them at the point therein specified. He further avers that the fences complained of do not cover the lines of the lots sold to him by the Ursuline Nuns, in 1811.

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defendant had thus a title to two tracts of land, extending 600 feet in depth from the line of Teinturier road, these dimensions being in french measure.

In the subsequent year, *Urbain Gaienné* purchased from the *Nuns* a parcel of ground situated in lot no. 3, adjoining the property acquired by the defendant in said lot, and measuring 266 feet along the line of the defendant's property from *Felicité* to St. Mary's road, 281 feet on the opposite and parallel side, and 370 feet in depth. Afterwards *Gaienné* purchased from the *Nuns* 68 feet front on St. Mary's and *Felicité* roads adjoining his previous purchase; and *René Théard* became the purchaser of the balance of lot no. 3, without warranty as to the deficiency in the measures marked on the plan of division. The property acquired by *Gaienné* was subsequently purchased by *Martinstein*, who failed, and surrendered it to his creditors. It was divided into building lots and sold by his syndics, when a lot adjoining in the rear, the property of the defendant, was adjudged to *George Green*, under whom the plaintiffs claim. The proper location of the boundary line between this lot and the property of the defendant, is the subject of the present suit.

The plaintiffs contend that Teinturier street as it now exists is the former Teinturier road, mentioned in the sale to *Guillotte*, and that, taking that street as his boundary, his fence encloses a larger portion of land than his title calls for. They further allege that, admitting, which they fully do, that Teinturier street at its present location measures only from *Felicité* to St. Mary's road, on the side of the defendant's property, 244 feet instead of 250 called for by *Lafon's* plan and the defendant's title, and even supposing, which they deny, that the said Teinturier road is out of its original location, yet by the defendant's own judicial admission, and by his solemn ratification made with full knowledge of the deficiency, Teinturier street as it now stands, is the fixed lower boundary of his land.

The defendant insists, on the other hand, that Teinturier road is an imaginary boundary, which did not exist at the time of the sale, and that the location of his land cannot be ascertained with reference to it; that he purchased under a plan in which were two main roads called *Felicité* and St. Mary's, the lines of which were then, have ever since been, and are still, well ascertained and known; that there is also on the plan another road, crossing the two roads just named, called *Chemin des Religieuses*, the lines of which were also and are still well ascertained and known; and that following down the two lines of St. Mary's and *Felicité* roads from the *chemin des Religieuses*, the point at which the distance between those two lines gives the front mentioned in the sale from the *Nuns* to him, to wit, 250 feet french measure, must be taken as the front of his lot; the consequence of this location being to advance his land more than 134 feet further up towards the river, thus overrunning the whole of the plaintiffs' lot, and the greater part of the ground surrendered by *Martinstein* to his creditors.

In the sale from the *Nuns* to the defendant, he acknowledged himself to be fully acquainted with the land sold and its limits, and stipulated to take it in the state in which it then was. This sale was made thirty eight years ago, and the defendant, who lived on the land, has never before claimed the location now contended for. His allegation, in the answer to this suit, that the fences complained of do but cover the lines of the lots sold to him, when coupled with the admission in the record that the distance from those fences to Teinturier street is over 600 feet, cannot well be understood otherwise than as a declaration that those fences do cover the lines of the property sold to him.

In August, 1831, the defendant sold to *McNeil* the front of this lot on Teinturier street, it being 244 feet french measure. This land is described in the act as part of that which the defendant purchased from the *Ursuline Nuns*, by act passed before *Narcisse Broutin*, notary public, bearing date the 21st of October, 1811. In the same year he made three other sales of lots fronting on Teinturier street, between St. Andrew's and St. Mary's roads, and described those lots to be portions of the ground acquired from the *Nuns* by the same act. The dimensions in those sales were given by reference to a plan of the faubourg, as it is now laid out, made by *Joseph Pilié*, in 1829, and on which the land sold to the defendant by the *Nuns* is represented as fronting on Teinturier street.

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After the long acquiescence of the defendant in the adverse possession of those claiming under *Urbain Gaiennié*, and the acts on his part seeming to recognize their title, if he was in error as to the proper location of his land, it was incumbent upon him to place that error beyond all reasonable doubt. We are of opinion that he has not done so.

The sale of the *Nuns* to *Teinturier*, in 1810, refers to the plan of division of their plantation. It is urged that the defendant purchased under a plan made by *Lafon*, posterior in date to the sale to *Teinturier*, and that the plans under which he and *Teinturier* bought were different. Both sales refer to the plan of division of the faubourg, and there is no evidence to show that that plan was ever changed by the *Nuns*; it represents the plantation as bounded in the rear by the bayou *Des Cannes*, and it is proved that the length of the side lines of *Teinturier's* land from Teinturier street to the centre of the bayou *Des Cannes*, is precisely the distance mentioned in his title. The bayou *Des Cannes* not being navigable, the back line of course runs through the middle of it. This fact goes far to prove that Teinturier street, as it now exists, must have been the road separating lot no. 1 from the property of the defendant.

The defendant acquired from the *Nuns* 239 feet 6 inches front on Teinturier road, between St. Andrew's and St. Mary's roads, and is shown to have sold 244 feet 6 inches front on the said Teinturier road; so that while there appears to be a deficiency of 6 feet in the front, between St. Mary's and Felicité roads, an excess of 5 feet is found between St. Mary's and St. Andrew's roads. The witness *Grant*, who is a surveyor and has measured the ground, testifies that the quantity of land presently found between St. Andrew's and Felicité roads on the line of Teinturier street, is only 9 inches less than what is called for in the original plan of the faubourg. He and *D'Hémécourt* farther state that, the difference between the measures in the original plan and those found by actual survey is, as they believe, owing to the fact that the lines of St. Mary's road have been altered from their original direction, and made to converge towards Felicité road, so as to leave a greater space than was originally given on the side of St. Andrew's road. They also testify that the line of St. Andrew's road has not been changed. The defendant maintains that the reverse is the truth; that the direction of St. Andrew's road alone has been changed, and that road made to converge with St. Mary's road less than it originally did.

The weight of evidence upon this part of the case is decidedly with the plaintiffs. One of their witnesses testifies that in running the lines he found on the line of St. Andrew's road ancient stakes and marks, which in all probability had been placed there before the plan of *Pilié* was made. The evidence of the defendant does not go to establish the location as it really was, but as it should have been. It does not rest upon actual knowledge of the fact at issue, but upon calculations of distances deduced from the direction of the side-lines, as they are

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b : held to confer upon the parties all the rights which result from the marriages of minors legally authorized.

It is ordered that, the judgment in this case be reversed, and the plaintiff's petition be dismissed, with costs in both courts.

### THE STATE v. BAILEY.

Where, after the evidence had been concluded in a prosecution for murder, the attorney for the State states to the judge, out of the hearing of the jury, that no case had been made, out against the prisoner, but makes no offer to discontinue and the court, taking a different view of the evidence, communicates the opinion of the prosecuting attorney to the jury, the court cannot be required to charge the jury that they were bound to acquit the prisoner in consequence of a virtual abandonment of the prosecution. The jury should be charged that, they were not bound by the opinion of the prosecuting officer, but were bound to examine the case and decide according to their oaths. *Per Curiam*: Without a proposition on the part of the State, assented to by the prisoner, the issue had necessarily to be submitted to the jury; and, when thus submitted, they, and not the prosecuting officer, were the judges of the guilt or innocence of the accused.

The opinions of medical men, examined as witnesses in a prosecution for murder, as to the cause of the death, are not conclusive upon the jury. Their testimony must be weighed by the jury, as other evidence.

**A** PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Serer*, for the appellant. The judgment of the court was pronounced by

KING, J. The defendant was convicted of murder, and has appealed from the judgment of the lower court given thereon. The grounds on which he asks a reversal of the judgment and a new trial, are presented in a bill of exceptions taken to the refusal of the judge to charge the jury as requested on the trial. The bill of exceptions is as follows:

"Be it remembered that, on the trial of this cause, while his honor, the judge, was charging the jury, he informed the jury that the attorney general had expressed to him the opinion that no case had been made out by the evidence against the defendant, and that he could not therefore urge a conviction by the jury; whereupon the counsel for the defendant asked his honor the judge, to charge the jury, that, inasmuch as the attorney general had expressed, and his honor had communicated to the jury, the opinion aforesaid, his honor was bound by law to charge the jury that they were bound to acquit the prisoner, the law officer of the State having virtually abandoned the prosecution; but the judge refused to charge as requested, and, on the contrary, charged the jury that they were not bound by the aforesaid opinion of the attorney general, but that it was their duty to examine the case irrespective of said opinion. To which refusal to charge as aforesaid requested, and to the said charge as given by his honor, the counsel for the defendant then and there excepted. And, moreover, the counsel of defendant asked his honor to charge the jury, that they were bound by the opinion as to the cause of the death of the deceased, as testified to by the physicians who gave their evidence on the trial; but the judge refused to charge as requested, but charged that they were bound to consider the whole evidence. To which refusal the said counsel then and there excepted, and tendered this bill of exceptions for signature.

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*By the Court:* The communication made to the court by the attorney general was not made in the hearing of the jury, and the court does not suppose that the attorney general expected that his opinion, given in this manner, would have been made known to the jury. The court, taking a different view of the case, felt that it was justice to the prisoner that the opinion of the attorney general should be made known: the court, therefore, charged the jury to take the case under consideration, and decide according to the oaths they had taken as jurors."

The district judge did not, in our opinion, err, in his instructions to the jury. The attorney general made no motion to discontinue the prosecution. He declined urging a conviction, and so informed the court, but still permitted the prosecution to proceed. The judge, on whose mind the evidence had produced a different impression, with all fairness communicated to the jury the opinion of the attorney general, and thus gave the prisoner the full benefit of that opinion. He left the case where the attorney general had left it, to the consciences of the jury, to be determined upon the testimony; and could not have done otherwise with the impressions which that testimony had made upon his mind. Without a proposition on the part of the State, and assented to by the prisoner, the issue had necessarily to be submitted to the jury; and, when thus submitted, they, and not the prosecuting officer, were the judges of the guilt or innocence of the accused.

The second point presented by the bill of exceptions is untenable. The general rule of evidence is that, witnesses can only testify to facts within their knowledge. An exception to the rule permits medical men to give their opinions in evidence on questions depending upon professional skill. But those opinions are not conclusive. They are to be weighed, as other evidence, by the jury, as the district judge properly charged. 1 Greenleaf on Ev. § 440. *Brabo v. Martin*, 5 La. 276.

*Judgment affirmed.*

### YORK v. CHILTON.

In an action for damages for an illegal arrest, if no probable cause be shown for the arrest, malice on the part of the person at whose instance it was made will be presumed.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Frost and J. Barker*, for the appellant. *Winthrop*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action by the plaintiff, who was the master of the british barque *Aldebaran*, against the defendant, growing out of the alleged agency of the defendant in removing the plaintiff from his command, in the port of New Orleans, in the month of April, 1845. The plaintiff claims ten thousand dollars damages. There was a general verdict for the defendant, and the plaintiff has appealed. The case stands before us for consideration, under certain bills of exception taken to the rejection of evidence offered on the trial of the cause.

The district judge was of opinion that certain points of law which this case presented, had been determined by this court in the case of *Barker v. York*, 3 An. Rep. 90, and acted upon this construction of our decision in his refusal to admit the evidence. That suit was instituted by *Barker*, an attorney and counsellor at law, against the owners of the barque *Aldebaran*, for professional



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services alleged to have been rendered to them on the removal of captain *York* from the command of the *Aldebaran*. We came to the conclusion, that the services alleged to have been rendered to the owners were not proved, and affirmed the verdict of the jury, which was for the defendant. The claims of the plaintiff for damages against the present defendant, we consider entirely unaffected by anything decided in the suit of *Barker*; and that all the questions both of law and fact are open for enquiry.

We are not at all surprised at the error into which our learned brother has, we think, fallen, when we consider the manner in which these cases have both been presented, as appears by the records; and the only mode by which any legal principles can be properly applied to this case is, by leaving entirely out of view everything which is irrelevant to it, and placing the causes of action of the plaintiff in legal and proper form. We suppose they may be reduced to these heads: The acts of the defendant, in depriving the plaintiff of the possession, custody and command of the *Aldebaran*, and his confederating with others for that purpose, depriving him of certain articles of personal property, interfering with his authority as master, and exciting the crew of the vessel to disobedience and mutiny, slandering and calumniating him, injuring him by these acts, and impairing his standing as a shipmaster and his character as a man, and causing him to be arrested and imprisoned under the process of the recorder of the Third Municipality. These appear to be the substance of the injuries for which the plaintiff seeks redress from the defendant; they are charged in the petition with sufficient forms of aggravation and wrong to cover almost any evidence that can support them. No exception has been taken to their cumulation in the same action, nor to the manner in which they are charged. On reducing the defendant's pleas and answers to their legal form, they may be considered as tendering the general issue, and a justification of the acts of the defendant, under the authority of the District Court of the United States, of her Britannic Majesty's consul in New Orleans, and of the owners of the barque *Aldebaran*, and as alleging gross misconduct on the part of the plaintiff in the command of the barque, thereby endangering the safety and the interest of the owners.

The district judge confined the evidence of the plaintiff to the taking of a chronometer, alleged to belong to the defendant, and to the false imprisonment charged in the petition; considering all the other matters as being disposed of by this court in the case of *Barker*, and by the decision of the district court of the United States on a libel filed by the defendant against the barque *Aldebaran*. We are of opinion that the court erred in so restricting the plaintiff's evidence, and that all relevant testimony, under the issues as stated, ought to have been received, and was not precluded by the decision in those cases. In relation to the proper testimony to be received under them, we have no reason to believe that any difference of opinion can exist between this court and the district court; and therefore consider that there is no necessity of going into details in relation to it. We can state, however, in general terms, that the depositions of the witnesses offered, and the record of the suit in the district court of the United States, ought to be admitted in evidence; and that the sailing orders to the plaintiff are not inadmissible. The same may be said of the bills of lading offered. The admission of both may be proper, at a certain stage of the cause. The bill of parcels for the chronometer offered by the defendant, not having been proved, we consider ought not to have been received in evidence.

There is a bill of exceptions to the charge of the judge, in relation to the ar-

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rest of the plaintiff, at the instance of the defendant, under process from the recorder's court. We think the judge in this case ought to charge the jury that, if there appear no probable cause for the arrest of the plaintiff, there is a presumption of malice on the part of the person at whose instance it was made.

We are not aware of anything else in this case which requires our attention, and remand it with the hope that it may be closed by the judicious verdict of a jury, whose peculiar province it is to terminate questions of damages of this nature.

It is therefore decreed that the judgment of the District Court be reversed, and the case remanded for a new trial, with directions to the judge to act on the matters embraced in this opinion as therein laid down; and it is further ordered that the appellee pay the costs of this appeal.

### THE STATE *v.* HERNANDEZ.

Where a prisoner, on being brought to the bar, declares that he is ready for trial, and accepts the jurors summoned to pass upon the charges preferred against him, he cannot afterwards object that a copy of the indictment was not served upon him.

**A**PPPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *J. M. Wolfe*, for the appellant. The judgment of the court was pronounced by

KING, J. The accused was convicted of counterfeiting silver coin current in the State, and, after sentence, appealed. No bills of exception were taken upon the trial of the cause. The accused relies for a reversal of the judgment of the lower court on a number of alleged errors, assigned as apparent on the face of the record. They are the following: 1st. That there is no statute declaring it an offence to counterfeit coin within this State, and the offence as charged in the indictment is not in the words of any statute relating to the counterfeiting of coin. 2nd. That it does not appear from the record that the defendant was served with a copy of the indictment, two days previous to the trial; nor that the grand-jury was drawn as required by law, nor of whom it was composed; nor that the accused was defended by counsel.

I. It appears to have escaped the attention of counsel that the accused was indicted under the 13th sec. of the act of 1818 (B. and C.'s Dig. p. 264); and that the offence is charged literally, in the words of the statute.

II. The defendant has brought before us a record defective in many respects, and exhibiting some of the proceedings connected with the drawing and empannelling of the grand-jury. He cannot expect us to give him the benefit of his own *laches*, and to presume that the proceedings of the lower court have been irregular. If he had reason to complain of the drawing or composition of the jury, he should have brought before us a complete record, exhibiting any irregularities which may exist in the proceedings to his prejudice.

When the accused was brought to the bar, he declared himself ready for trial, and accepted the jurors who were to pass upon the charges preferred against him. This was a waiver of a copy of the indictment, if indeed one had not been previously served upon him. Whether or not the prisoner was defended by counsel does not appear; but there is nothing to show that he made an ineffectual application to the court to assign him counsel.

*Judgment affirmed.*

## THE STATE v. MONASTERIO.

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No appeal will lie from a judgment, sentencing one prosecuted under the stat. of 2d April, 1832, for selling intoxicating liquors to a slave without the consent of his master, to forfeit any license held by him, and to be forever deprived of the right of holding such a license in future, and condemning him to pay a fine of three hundred dollars and the costs of prosecution, or to remain in jail until such fine and costs, and jail fees are paid, for a term not exceeding six months. *Per Cur:* The fine is not sufficient to give jurisdiction; the forfeiture gives no jurisdiction of itself, nor can it aid the deficiency of the fine in that respect; and the costs, being matters of course, can have no such effect.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Budd*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** The defendant has appealed from a judgment of the First District Court of New Orleans, by which he was, after conviction, sentenced, for the offence of selling liquors to slaves, to forfeit any license or licenses he may hold under any authority of this State, and to be forever deprived of the right of obtaining and holding any such license, and was further sentenced to pay a fine of three hundred dollars, and the costs of prosecution, which fine, together with the jail costs, was to be paid into the hands of the sheriff immediately in open court after judgment, and, in default thereof, to be arrested and conveyed to jail, there to remain until said judgment be satisfied and the jail fees paid, or for a term not exceeding six months. This prosecution was under the act of 2d April, 1832, entitled "*An act more effectually to prevent slaves from obtaining spirituous or intoxicating liquors, without the consent of their masters.*"

The attorney general has moved to dismiss the appeal, on the ground that this court cannot take cognizance of it, because the fine imposed does not exceed three hundred dollars.

The proceedings against the defendant were by information in the name of the State, for the offence committed, and were criminal and not civil proceedings. The jurisdiction of this court is limited on criminal cases to questions of law alone, whenever the punishment of death or hard labor is inflicted, or when a fine exceeding three hundred dollars is actually imposed. Con. article 63.

The fine imposed is not of an amount sufficient to give the court jurisdiction. The forfeiture gives no jurisdiction of itself, nor can it aid the deficiency of the fine in that respect. The costs, being matters of course, after conviction can have no such effect, under the definite and positive limitation of the constitution.

*Appealed dismissed.*

## CLEMENTS v. CASSILLY et al.

Where, in a bond executed for the release of property attached, three persons are named as principals, but the bond is signed by but one of the principals and a surety, the latter will not be bound, in the absence of evidence to destroy the presumption that he expected the three persons named as principals to be bound as such, or to show that he would have any recourse against them, if he paid the amount.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Perrin and Finney*, for the appellant. *Conklin and Mott*, for the defendants. The judgment of the court was pronounced by

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SLIDELL, J. An attachment having been levied upon the property of the defendant, a bond was given to release it, which was signed by *Fullerton*, as surety. *Cassilly, Wooden and Babcock* were named as the principals in the bond, but *Wooden* was the only one of the principals who signed. Judgment having been rendered against *Wooden* alone, and a *feri facias* having been taken out against him without success, a rule was taken against *Fullerton* to show cause why he should not be condemned to pay the amount of the judgment. The district judge discharged the rule, and the plaintiff has appealed.

We are of opinion that the surety is not bound upon this bond, *Cassilly and Babcock*, the proposed principals, not having signed it; and there being no evidence to show that the surety would have any recourse against them if he paid the money, or to destroy the presumption that he expected them to be bound as principals. See *Wood v. Washburn*, 2 Pick. 24. *Bean v. Parker*, 17 Mass. 591.

*Judgment affirmed.*

### McMASTERS v. PALMER.

Pleas in reconvention must be set forth with the same certainty, as to amounts, dates &c., as if the party opposing them were plaintiff in a direct action.

Where evidence in support of a reconventional demand has been illegally received, though excepted to on the ground of its inadmissibility on account of the vagueness and uncertainty of the plea in reconvention, the court of the first instance cannot deprive the party of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make any showing contradictory of the evidence so received.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Van Dalsen*, for the appellant. *Remy and Soulé*, for the defendant. The judgment of the court was pronounced by

ROST, J. The defendant was the banker of the plaintiff, who now sues for \$300, the alleged balance in his favor of their general account, which he annexes to his petition. The defendant denied his being in any manner indebted to the plaintiff; and alleged that, on the contrary, at the time specified in the petition as the period when the discount business to which it alluded terminated, the balance, instead of being against the defendant, was in his favor, for a sum exceeding \$2,400. He prays for a judgment in reconvention. The plaintiff excepted to the plea in reconvention on the ground that it is too vague and uncertain, and should have been set forth with certainty as to amount and date. The court did not act on this exception, but, on the trial of the cause, when the defendant offered in support of his claim in reconvention three checks of his own to the order of the plaintiff, which it is admitted the bank paid him, the said plaintiff opposed their admission as evidence, on the grounds alleged in his exception. This opposition was overruled by the court, and he took a bill of exceptions. The court proceeded to try the cause, and gave judgment in favor of the defendant in reconvention, for \$2,050.

The plaintiff moved for a new trial, on the grounds alleged in his bill of exceptions, and further on the ground that the judgment is contrary to, or at least unsupported by, evidence, because the checks admitted by the court to prove the recon-

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v.  
PALMER. ventional demand do not raise a presumption of indebtedness of the plaintiff to the defendant.

The district judge stated, in refusing the new trial, that he had admitted the defendant's checks in evidence as items to his credit, in addition to the items placed to his credit in the plaintiff's account. He further stated that, at the time of rendering the judgment, he had told the plaintiff's counsel that if he would make any showing that these checks did in reality refer to other transactions than those embraced in the account, he would grant a new trial; no showing having been made the new trial was refused, and the plaintiff took the present appeal.

Under the uniform jurisprudence of this court, the exception of the plaintiff was well taken, and should have been sustained. The plea in reconvention was too vague and uncertain, and the defendant should not have been permitted to offer evidence under it. *Pargoud v. Grice*, 6 La. 75. *White v. Moreno*, 17 La. 372. *Jonau v. Ferrand*, 2 Rob. 216. *Wilcox v. His Creditors*, 11 Rob. 347. 5 La. 450. The court could not deprive the plaintiff of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make a showing contradictory of the evidence already received.

It is true, as urged by the plaintiff, that the mere paying over of money, or of a bank check, by a party to another, is not, as a general rule, presumptive evidence of a loan. But as the checks on which the defendant relies are not properly before us, we are unable to determine whether the defendant has brought himself within any exception to that rule.

Taking into consideration the previous connection in business of the parties and the object of this suit, we believe that the ends of justice will be promoted by remanding it.

It is, therefore, ordered that, the judgment in this case be reversed, and the case remanded for further proceedings, according to law, and in conformity with the rules laid down in the foregoing opinion; the defendant and appellee paying the costs of this appeal.

### THE UNION BANK OF LOUISIANA v. GUILLOTTE.

Where the report made by a sworn surveyor, appointed by the court having cognizance of an action of boundary, is defective, and the plan annexed to it is not in conformity with the titles, the report should be rejected and a new survey ordered. C. C. 837. The surveyor is but an expert, and his operations are always under the control of the court. The defectiveness of the report is no ground for non-suiting the plaintiff.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Denis*, for the appellants. *Soulé*, for the defendant. The judgment of the court was pronounced by

*Rost, J.* This is an action of boundary, and for the removal of certain fences erected around property alleged to belong to the plaintiffs. The prayer of the petition is that surveyors be appointed to inspect the adjacent estates, and report according to the titles of the parties; that the boundary lines between said estates be fixed, so as to divide proportionally the over extent of land found in the original tract of which these estates are parcels. There is also a prayer that the fences complained of be removed. The defendant has joined the plaintiffs in the prayer that surveyors be appointed to examine the premises in dispute, and report; but he

denies the allegations in the petition having a tendency to establish the dividing line of the property held by them at the point therein specified. He further avers that the fences complained of do not cover the lines of the lots sold to him by the Ursuline Nuns, in 1811.

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An order of survey was granted by the court, and a commission issued to *Louis Bringier*, a sworn surveyor of the State, who made a survey and report, in all respects favorable to the pretensions of the defendant. The district judge being of the opinion that the survey was not made in conformity with the titles of the parties, and that the surveyor should have ascertained the location of the fixed boundary called for by the defendant's title, rejected both the survey and the report; and being farther of opinion that, in actions of boundary, art. 829 of the Civil Code imperatively requires the limits to be fixed by a sworn surveyor, and that, without the report of the surveyor duly homologated, no judgment can be rendered, he non-suited the plaintiffs. Both parties have appealed, and ask that the case be considered on its merits.

We are of opinion that the district judge erred, in dismissing the petition. The article of the Code declaring that limits in actions of boundary must be fixed by a sworn surveyor of the State, is to be taken in connection with art. 837, which makes it the duty of the judge in those cases to appoint surveyors to inspect the premises, and to decide on their report, according to the titles of the parties and the plans which shall be presented to the court. If the reports thus made are defective, and the plans annexed to them not in conformity with the titles, the court ought to reject them, and order a new survey to be made according to law. The surveyor is but an expert; and his operations are always under the control of the court.

Before going into an examination of the merits of this case, it is necessary to state the facts upon which it rests. In 1810, the *Ursuline Nuns* divided their plantation adjoining *faubourg Annunciation*, into eleven lots, numbered from one to eleven, and caused a plan of this division to be made and deposited in the office of *N. Broutin*, a notary public of this city. On this plan two streets called *St. Andrew's road* and *Felicité road* were laid out at the side lines of the plantation; a third street called *St. Mary's road* was opened through the middle of it, and extended in the rear until it reached lot no. 1, which remained undivided, and included all the rear of the plantation. All these streets converged from the front to the rear of the plantation. Shortly after this division the *Nuns* sold to *Teinturier* the lot no. 1, measuring 522 feet 6 inches front on the side of the river, 900 feet on the side of the widow *Panis*, and 1078 feet on the side of and adjacent to the suburb *Annunciation*, being, says the sale, part of the plantation which the *Nuns* have divided into lots, in conformity to the plan deposited in the office of *N. Broutin*. After this sale, to wit, on the 21st. of October, 1811, the defendant purchased from the *Nuns* two parcels of ground, one situated within the lines of lot no. 2, in the plan of the *faubourg*, measuring 239 feet 6 inches front to the road which divided it from the property acquired by *Teinturier*, and 300 feet in depth and front on *St. Andrew's* and *St. Mary's* roads; the other situated within the lines of lot no. 3, and measuring 250 feet front on said road along *Teinturier's* property, and 300 feet in depth and front on *St. Mary's* and *Felicité* roads. On the 9th of December, 1811, the defendant purchased from the *Nuns* two other parcels of ground situated in the same lots, nos. 2 and 3, contiguous to the land already acquired by him, and extending from the rear lines of said land 300 feet front on *St. Andrew's*, *St. Mary's* and *Felicité* roads. The

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defendant had thus a title to two tracts of land, extending 600 feet in depth from the line of Teinturier road, these dimensions being in french measure.

In the subsequent year, *Urbain Gaienné* purchased from the *Nuns* a parcel of ground situated in lot no. 3, adjoining the property acquired by the defendant in said lot, and measuring 266 feet along the line of the defendant's property from *Felicité* to *St. Mary's* road, 281 feet on the opposite and parallel side, and 370 feet in depth. Afterwards *Gaienné* purchased from the *Nuns* 68 feet front on *St. Mary's* and *Felicité* roads adjoining his previous purchase; and *René Thiéard* became the purchaser of the balance of lot no. 3, without warranty as to the deficiency in the measures marked on the plan of division. The property acquired by *Gaienné* was subsequently purchased by *Martinstein*, who failed, and surrendered it to his creditors. It was divided into building lots and sold by his syndics, when a lot adjoining in the rear, the property of the defendant, was adjudged to *George Green*, under whom the plaintiffs claim. The proper location of the boundary line between this lot and the property of the defendant, is the subject of the present suit.

The plaintiffs contend that *Teinturier* street as it now exists is the former *Teinturier* road, mentioned in the sale to *Guillotte*, and that, taking that street as his boundary, his fence encloses a larger portion of land than his title calls for. They further allege that, admitting, which they fully do, that *Teinturier* street at its present location measures only from *Felicité* to *St. Mary's* road, on the side of the defendant's property, 244 feet instead of 250 called for by *Lafon's* plan and the defendant's title, and even supposing, which they deny, that the said *Teinturier* road is out of its original location, yet by the defendant's own judicial admission, and by his solemn ratification made with full knowledge of the deficiency, *Teinturier* street as it now stands, is the fixed lower boundary of his land.

The defendant insists, on the other hand, that *Teinturier* road is an imaginary boundary, which did not exist at the time of the sale, and that the location of his land cannot be ascertained with reference to it; that he purchased under a plan in which were two main roads called *Felicité* and *St. Mary's*, the lines of which were then, have ever since been, and are still, well ascertained and known; that there is also on the plan another road, crossing the two roads just named, called *Chemin des Religieuses*, the lines of which were also and are still well ascertained and known; and that following down the two lines of *St. Mary's* and *Felicité* roads from the *chemin des Religieuses*, the point at which the distance between those two lines gives the front mentioned in the sale from the *Nuns* to him, to wit, 250 feet french measure, must be taken as the front of his lot; the consequence of this location being to advance his land more than 134 feet further up towards the river, thus overrunning the whole of the plaintiffs' lot, and the greater part of the ground surrendered by *Martinstein* to his creditors.

In the sale from the *Nuns* to the defendant, he acknowledged himself to be fully acquainted with the land sold and its limits, and stipulated to take it in the state in which it then was. This sale was made thirty eight years ago, and the defendant, who lived on the land, has never before claimed the location now contended for. His allegation, in the answer to this suit, that the fences complained of do but cover the lines of the lots sold to him, when coupled with the admission in the record that the distance from those fences to *Teinturier* street is over 600 feet, cannot well be understood otherwise than as a declaration that those fences do cover the lines of the property sold to him.

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In August, 1831, the defendant sold to *McNeil* the front of this lot on Teinturier street, it being 244 feet french measure. This land is described in the act as part of that which the defendant purchased from the *Ursuline Nuns*, by act passed before *Narcisse Broutin*, notary public, bearing date the 21st of October, 1811. In the same year he made three other sales of lots fronting on Teinturier street, between St. Andrew's and St. Mary's roads, and described those lots to be portions of the ground acquired from the *Nuns* by the same act. The dimensions in those sales were given by reference to a plan of the faubourg, as it is now laid out, made by *Joseph Pilié*, in 1829, and on which the land sold to the defendant by the *Nuns* is represented as fronting on Teinturier street.

After the long acquiescence of the defendant in the adverse possession of those claiming under *Urbain Gaienné*, and the acts on his part seeming to recognize their title, if he was in error as to the proper location of his land, it was incumbent upon him to place that error beyond all reasonable doubt. We are of opinion that he has not done so.

The sale of the *Nuns* to *Teinturier*, in 1810, refers to the plan of division of their plantation. It is urged that the defendant purchased under a plan made by *Lafon*, posterior in date to the sale to *Teinturier*, and that the plans under which he and *Teinturier* bought were different. Both sales refer to the plan of division of the faubourg, and there is no evidence to show that that plan was ever changed by the *Nuns*; it represents the plantation as bounded in the rear by the bayou *Des Cannes*, and it is proved that the length of the side lines of *Teinturier's* land from Teinturier street to the centre of the bayou *Des Cannes*, is precisely the distance mentioned in his title. The bayou *Des Cannes* not being navigable, the back line of course runs through the middle of it. This fact goes far to prove that Teinturier street, as it now exists, must have been the road separating lot no. 1 from the property of the defendant.

The defendant acquired from the *Nuns* 239 feet 6 inches front on Teinturier road, between St. Andrew's and St. Mary's roads, and is shown to have sold 244 feet 6 inches front on the said Teinturier road; so that while there appears to be a deficiency of 6 feet in the front, between St. Mary's and Felicité roads, an excess of 5 feet is found between St. Mary's and St. Andrew's roads. The witness *Grant*, who is a surveyor and has measured the ground, testifies that the quantity of land presently found between St. Andrew's and Felicité roads on the line of Teinturier street, is only 9 inches less than what is called for in the original plan of the faubourg. He and *D'Hémécourt* farther state that, the difference between the measures in the original plan and those found by actual survey is, as they believe, owing to the fact that the lines of St. Mary's road have been altered from their original direction, and made to converge towards Felicité road, so as to leave a greater space than was originally given on the side of St. Andrew's road. They also testify that the line of St. Andrew's road has not been changed. The defendant maintains that the reverse is the truth; that the direction of St. Andrew's road alone has been changed, and that road made to converge with St. Mary's road less than it originally did.

The weight of evidence upon this part of the case is decidedly with the plaintiffs. One of their witnesses testifies that in running the lines he found on the line of St. Andrew's road ancient stakes and marks, which in all probability had been placed there before the plan of *Pilié* was made. The evidence of the defendant does not go to establish the location as it really was, but as it should have been. It does not rest upon actual knowledge of the fact at issue, but upon calculations of distances deduced from the direction of the side-lines, as they are



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given in the original plan of division. In the two plans which have been produced the direction of those lines is not the same, and the results of the calculations made from them show the mistakes of the surveyors much more satisfactorily than the alleged error in the location of the defendant's land. But, besides this, the defendant has availed himself of the alleged change of direction of St. Andrew's road, by selling 5 feet front more than he says he was entitled to on Teinturier street. These sales must be viewed as a ratification on his part of the plan in reference to which they were made.

If Teinturier street is not the true boundary, and the mode proposed by the defendant to ascertain it be adopted, the front of his property between St. Mary and Felicite roads will be advanced 134 feet from Teinturier street towards the river. But the same rule must also be applied to the lots between St. Andrew's and St. Mary's streets, and their front carried beyond Teinturier street upon lot no. 1, at the place where the distance between those two roads is only 239 feet, 6 inches. This location cannot be reconciled with the description in the act of sale, and the plan to which it refers, giving the said front to lots nos. 2 and 3.

For the reasons assigned it is ordered, that the judgment in this case be reversed, and the case remanded for further proceedings according to law, and in conformity with the foregoing opinion; the costs of this appeal to be equally divided between the parties.

### SUCCESSION OF GIROD.

Where there are different administrators of a succession, succeeding each other, each administrator will be entitled to commissions on such portions of the estate as have been administered by him.

The fact that some time after the opening of a succession, a large portion of the property included in the inventory and apparently belonging to it, was claimed by the heirs of another person, and, after a protracted litigation, adjudged to belong to them, will not deprive the executors, who had, for several years, administered the property, by providing tenants, collecting rents, paying taxes, and making the repairs necessary for its preservation, of the right to charge the usual commissions upon the property. *Per Curiam*: It would be unjust to permit the real owners of the property to enrich themselves at the expense of the executors. If this equitable view be correct, it is immaterial whether they be considered as strictly clothed with seizin of the entire estate, or not—whether the compensation be granted as commissions, *eo nomine*, in the technical sense of the Code, or as a just remuneration for services which have enured to the benefit of the parties who have recovered the property.

Decision in *Succession of Mylne*, 1 Rob. 400, as to the allowance of commissions to an executor on unproductive property of the succession, affirmed.

The reason of the rule refusing the allowance of commissions to an executor on unproductive property of the succession is, that its administration gives them little or no trouble. Thus the mere payment of the taxes on uncultivated lands, will not authorize the allowance of a commission on their value. But there are cases in which commissions should be allowed on such property; as where a suit had been instituted to evict the executor, and he defends it successfully, thus saving its value to the succession; or where the proper public authorities require the erection of a levee to protect the uncultivated lands from inundation, which would impair their value, while that value would, on the other hand, be enhanced, in a greater ratio than the expenditure, by its construction.

Where a tract of land, fronting a bayou, opposite to a sugar plantation, has been used to supply timber and fuel for the purposes of the plantation, it cannot be regarded as waste and unproductive land, on the value of which the executors cannot charge a commission.

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**A**PPEAL from the Second District Court of New Orleans, *Canon, J. L. Janin*, for the opponents and appellants. *Soulé and Roselius*, contra. The judgment of the court was pronounced by

SUCCESSOR  
OF  
GIROD.

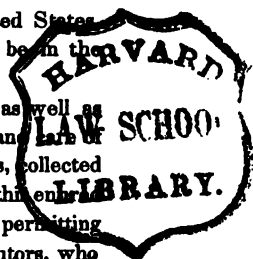
**SLIDELL, J.** The subject of controversy upon the present appeal is, the extent of the commissions to which the executors are entitled. There was a question raised by the appellants as to two due bills, alleged to be due by one of the executors. But this point has been abandoned since the submission of the cause.

We concur with the appellants that a deduction of \$426 90 should be made, that being the amount of commissions allowed to the predecessors of the present dative executors. See the *Succession of Mylne*, 1 Rob. 400.

The principal contest is with regard to the right of the executors to charge a commission upon the entire estate inventoried, it having been adjudged, since the inventory, that five-eighths of an important portion of it really belonged to the heirs of *Claude François Girod*.

When the present succession was opened, all the property inventoried apparently belonged to it. But some time after the dative testamentary executors had entered upon the discharge of their duties, proceedings in chancery were instituted in the United States Court by *Pargoud* and others, as heirs of *Claude Girod*, who died a long while ago, for the purpose of recovering a portion of this apparent property of *Nicolas Girod's* succession, on the ground that *Nicolas* acted fraudulently in the settlement of the succession of his brother *Claude*, of which he was executor, having bought portions of the estate by persons interposed &c. After a protracted litigation, a decree was rendered in favor of the complainants, and was affirmed by the Supreme Court of the United States, declaring the ownership of a certain interest in certain property to be in the heirs of *Claude*.

But it is not disputed that, during the pendency of this litigation, as well as previously, the executors of *Nicolas Girod* had the superintendence and care of this property. They attended to its administration, provided tenants, collected the rents, paid the taxes, preserved it by necessary repairs, &c. All this ended to the benefit of all parties interested. There would be no justice in permitting the heirs of *Claude* to enrich themselves at the expense of these executors, who have rendered their services in good faith, under the command of a court of competent jurisdiction, in the administration of property apparently belonging to their testator. And if this equitable view be correct, it is quite immaterial whether they are to be considered as strictly clothed with the seizin of the entire estate or not—whether we grant them the compensation as commissions, *eo nomine*, in the technical sense of the Code, or in the nature of a just remuneration for services which have enured to the benefit of *Claude's* heirs. It is very certain that we should have found those heirs taking very different ground, if the executors, upon the institution of the chancery proceedings, had abandoned the care of the property, neglected the collection of the rents and revenues, and suffered it to fall into dilapidation. The commissions of two and a half per cent are nothing more than a fair *quantum meruit* under the evidence, even if not allowable as executor's commissions strictly speaking. If the heirs of *Claude* are controlled by this reasoning, *a fortiori*, the legatees of *Nicolas* are.



It is next said that, the commissions are not allowable upon the unproductive lands.

In the case of the *Succession of Mylne* it was held that, the executors could not have commissions upon the value of certain lands described in the opinion of

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the court as "waste lands, not cultivated, and a part not susceptible of cultivation;" and the court there remarked: "We cannot regard that species of property as the productive property of a succession, upon which the executor is entitled to charge a commission. The best evidence that it is unproductive is that, in the hands of the present executor, it has produced nothing."

We certainly are not disposed to depart from the principles recognized in that opinion. But we think that they ought not to be taken without qualification, and extended beyond their fair and reasonable import. The reason of the rule is that, an executor should not receive a commission upon that which gives him little or no trouble to administer; and, in this sense, we do not agree with the counsel of the executors in the assertion that the mere trouble of paying taxes on property entitles an executor to his commissions upon uncultivated land. In *Mylne's* case no doubt the lands were taxed, and the executors probably had the trouble of paying the taxes.

But there may be other circumstances which would, under a reasonable interpretation of the rule, and without any conflict with the spirit and fair intendment of *Mylne's* case, entitle the executor to a commission upon uncultivated land. Suppose a suit is brought to evict the executor by an adverse claimant, and he defends the suit with success, and thus saves the estate the value of the land, this, we think, a fair ground for charging a commission, even on uncultivated land.

Again, take the case which (as asserted by counsel, and not denied by the opposite party,) occurred here with regard to a portion of the lands on the Lafourche. The proper public authority commands, or necessity requires, that a levée should be erected to protect the uncultivated lands from an inundation which would impair their value, while that value, on the other hand, would be enhanced in a greater ratio than the expenditure by the construction of a levée. This would impose trouble and responsibility upon the executor, which would justify a charge of commissions. The law on this subject should be construed with a due reference to its spirit and the intention of the law giver; and such reasonable construction will redound to the true interests of heirs and creditors.

We may remark that some of the lands which figure in the inventory as uncultivated, may, in point of fact, not come fairly under the designation of the Code. For example, the tract fronting the bayou Lafourche, opposite a sugar plantation of the deceased, may have been used for the supply of timber and fuel for the plantation purposes; and, if so, could not be fairly classed as waste and unproductive land.

As we have not the full means of closing the present controversy, we think the ends of justice will be promoted by remanding the cause; and if the parties, who are no doubt fully acquainted with all the material facts, do not choose to make an amicable settlement, the views we have expressed will, at all events, facilitate the future judicial proceedings.

It is therefore decreed that, the judgment of the court below be reversed, and that this cause be remanded for further proceedings, the appellees paying the costs of the appeal.

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### HART et al. v. LAUVE et al.

Decisions in *Knight v. Lauve*, 3 An. 64, *M'Alpin v. Lauve*, 2 An. 1015, and *Harrod v. Woodruff*, 3 Rob. 335, affirmed.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. T. R. Wolfe*, for the plaintiffs. *Sigur and Bonford*, for the appellants. The judgment of the court was pronounced by

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SLIDELL, J. On the question of competency, and on the merits, we consider this case as covered by the cases of *Knight v. Lauve*, 3 An. 64, and *M'Alpin v. Lauve*, 2 An. 1015.

The question of prescription is settled by the case of *Harrod v. Woodruff*, 3 Rob. 335, and the cases there cited.

*Judgment affirmed.*

### SUCCESSION OF BRINGIER.

Decision in *Succession of Fitzwilliams*, 3 An. 489, as to the share of the surviving spouse, and the nature and extent of the usufruct, under sec. 2 of stat. of 25 March, 1844, affirmed.

The fact of a surviving spouse having taken out letters of administration on the estate of the deceased, does not in any manner affect her usufructuary rights under the stat. of 25 March, 1844, s. 2. By the terms of the statute the survivor takes the usufruct of so much of the share of the deceased in the community property as may be inherited by the heirs. That share consists of the one half which belonged to the deceased, subject to the debts. With that encumbrance it descends to the heirs, from the instant of the ancestor's death. The right of the survivor to the usufruct attaches at the same moment that the right of property accrues in favor of the heirs. *Per Cur.* The usufructuary is permitted, in such a case, to retain the whole property and receive its fruits, on making the necessary advances to discharge the debts, which are to be reimbursed, without interest, at the termination of the usufruct; or he may sell property to an amount sufficient to discharge the debts, unless the heirs will make the necessary advances; and he may exercise his right upon the residue. C. C. 578, 579. Nor is the exercise of the right of the usufructuary inconsistent with that of the heirs, or of the creditors, to insist on a speedy adjustment of the debts of the community, and on a sale of property for that purpose, if necessary.

**A** PPEAL from the District Court of Ascension, *Nicholls, J.*

*Preston and Hiley* for the opponents. The questions for solution are: *First.* Can a surviving widow, or the heirs of the deceased, claim from an administrator any portion of the community property, or of the revenues derived therefrom while the same is under administration, until all the debts and charges thereof are paid, and the same is fully liquidated?

*Second.* Can a usufructuary under the act of 25th March, 1844, claim any greater rights than the owner would have enjoyed, if no such law existed? If anything be settled by the jurisprudence of this court beyond all controversy, it is that neither a widow nor heirs can claim anything but a residuum of an estate; that is, whatever may remain after its final liquidation.

The propositions assumed by the appellees, and finally concurred in by the lower court, were: 1st. That some of the heirs accepting unconditionally, and others with the benefit of inventory, the succession must be administered. C. C. 1031, 1040. 2d. That the duties and responsibilities of administrators are the same as those of curators of vacant successions. C. C. 1042. 3d. That the fruits and revenues of a succession must be administered and accounted for by the administrator. C. C. 1140. 4th. That the sale of succession property cannot be made without absolute necessity. C. C. 1158. 17 La., 503. 5th. That neither the widow in community, nor the heirs of the deceased have more than a residuary and eventual interest, which can only be ascertained and claimed after a full administration and final settlement of the affairs of the succession. Civil Code, 1066. 1 Rob. 407. 17 La. 502, 288, 104. 8 La. 409. 17 La. 246. 10 Rob. 459. 11 Rob. 51, 75. 12 Rob. 43, 217. 9 Rob. 200. 4 Rob. 414, 459. 5 La. 386. 7 Rob. 404. 6th. That this residuum is the portion inherited by the heirs, and to that share, so ascertained, alone, does the act of 25th March, 1844, apply.

To test the correctness of these propositions we must suppose that the administration of *Bringier's* estate was in other hands than in those of his widow, and

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| 48 | 724 |
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then inquire whether the act of 25th March, 1844, would present any legal obstacle to the settlement of the succession, in conformity with the legal rules previously laid down for his government. The usufruct given by the act of 1844 to the surviving spouse, operates "on so much of the share of the deceased as may be inherited by such issue." And the question that here arises is, *when* does this usufruct commence? Suppose that the widow herself claimed from the administrator the revenues of her half of the community property during the administration, would he not be sustained by the law, and by the repeated decisions of this court, in replying that she was only entitled to one half of the balance found due after a full administration and payment of all the debts and charges of the estate. See *Succession of Thomas*, 12 Rob. 217. In the case of *Arthur vs. Cochrane*, 12 Rob. 43, it was ruled that "a succession cannot be said to be the property of the beneficiary heirs, and does not legally come into their possession until it has been administered upon in due course of law." After having paid the creditors, deducted his commissions and other lawful expenses, if a balance remains in his hands, the administrator shall pay it over to the heir. C. C. 1066. The fruits and revenues must be administered and accounted for as the other effects of the succession. C. C. 1141. And without necessity the real estate cannot be sold. C. C. 1158. 17 La. 502.

If, then, the widow could not legally require another administrator to account to her at once for the revenues of the estate, by what authority can she, because she is the administratrix, legally retain it? Should the position contended for by the widow be sustained, it would lead in many instances to the greatest injustice. It might happen that a large estate, encumbered with mortgages and privileges, would not suffice to pay ordinary creditors, when, by applying the revenues of the estate to that purpose, while the same is under administration, the assets would be ample to meet at once all liabilities. And yet if the surviving spouse could at any time claim the revenues from the administrator, the creditors might often seek in vain to coerce the reimbursement of the fund so paid to be applied to the debts, and the unconditional heir would be bound for their payment. Such a construction cannot be given to the law, without violating principles that have been long firmly established upon the highest authority.

If it were necessary to suggest any other authority in support of the doctrine contended for by the appellees, it is that while the law authorises a surviving spouse to have property in common between him and his children adjudicated at the price of estimation, no such adjudication can be made before a liquidation of the community, showing the *real amount of the acquets*, and until the debts of the community are paid. *Hall v. Foley*, 17 La. 378.

We contend, then, in the language of the judgment appealed from, to which we refer, that the right of the applicant, as surviving partner in community, commences only after the estate is finally settled by the payment of the creditors of the estate; and that the usufruct is restricted to the residuum belonging to the estate, the amount, nature, and character of which can be determined only on such final settlement; that the revenues in the hands of the applicant are assets belonging to the succession of *M. D. Bringier*; and that these assets, constituting, as it is admitted, a cash fund abundantly sufficient to meet the liabilities of the succession, there is therefore no legal necessity for a sale of any portion of the property of the estate to effect that object.

*Berault*, for the appellant. This case presents two questions growing out of sec. 2 of the stat. of 25 March, 1844, relative to community property. Of those two questions the one involving the constitutionality of the act above recited will be first disposed of, as on its fate depends that of the second, concerning the rights of the usufructuary.

The legislature can certainly claim the right to regulate the order of descent, and to new-model and fashion, for the future, the law of successions. It can, if it thinks fit, exclude the son from the estate of the father, and vest the inheritance in any one else. As regards the rights of the surviving partner in community, they, resulting from a contract, must be governed by the law in force at the time of the celebration of the marriage, because she holds by purchase, whereas the rights of the heirs to the share of the deceased in the acquets which form a part of his succession are to be regulated by the law in operation at the opening thereof, notwithstanding it may have been different at the time the property was acquired. The right of the heirs cannot be vested until the ancestor is dead, and this on the strength of the maxim, "*memo est hæres viventis*." See *Dixon v. Dixon*, 4 La. 191. 2 Blacketone, 208.

The second question of law is, when does the right of usufruct under the act of 1844 accrue?

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Before discussing this point, let us examine the first of the propositions assumed by the counsel of the opponents and adopted by the court below in its judgment.

That some of the heirs accepting unconditionally, and others with benefit of inventory, the succession must be administered. C. C. 1034, 1040.

Were the provisions of our Civil Code, and the numerous decisions of the late Supreme Court, (with the exception of the case of *Irwin vs. Orillon*,) to be taken as our sole criterion, the above rule might be considered an inflexible one. But such is not the case. Those provisions are controlled and modified by art. 976 C. P. which renders the appointment of an administrator imperative only when the creditors of the succession require it. This point was directly made and passed upon in the case of *Bryan v. Atchison*, 2d An. 465. The court, in commenting upon the principles of the two Codes, said: "It is true that, under the dispositions of the Civil Code, when the heirs claimed the term to deliberate, an administrator was to be appointed in all cases; and when the succession was afterwards accepted under the benefit of inventory, the administrator was to continue in his functions, and to settle and liquidate the succession. But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed in such cases, *if any of the creditors of the succession require it*; and this we take to be the rule now in force, as being the last expression of legislative will, and having, moreover, the advantage of being founded in reason, and harmonizing with the other provisions of the Code of Practice regulating the administration of successions. C. P., art 976." 2 An. 465. In that case the heirs were all minors, and their natural tutrix, as such, could legally administer the succession and sue for a sale of the property. The principle is the same when the heirs of age have accepted unconditionally, and the minors under the benefit of inventory. In such a case, when no administrator has qualified, the heirs of age concur with the tutor of the minors, in the prosecution of suits to recover debts due the estate, and are joined with the latter in all actions against it. *Irwin v. Orillon*, 8 La. 213. From these two decisions we draw the conclusion that, the appointment of an administrator is not legally indispensable to the settlement of a succession.

The second proposition, that the duties and responsibilities of an administrator are the same as those of curators of vacant successions (C. C. 1042), and the third, that the revenues and fruits of succession property must be administered and accounted for by the administratrix (C. C. 1140) are not denied; the administratrix accounts for those fruits and revenues to those entitled to them, be they the survivor, heirs, or legatees. The fourth proposition: "that the sale of succession property cannot be made without absolute necessity (C. C. 1158)," will not be discussed, as it is admitted that the debts of the succession would require the sale of the property described in the petition, if the proceeds of the crops, or the fruits and revenues made since the opening of the succession, are not first applicable to the payment of those debts.

The fifth proposition is, "that neither the widow in community, nor the heirs of the deceased, have more than a residuary and eventual interest, which can only be ascertained and claimed after a full administration and final liquidation and settlement of the affairs of the succession."

By the act of 1844, the survivor shall "hold in usufruct, during his or her natural life, so much of the share of the deceased in said community property as may be inherited by such issue." The community, which formerly existed between *Bringier* and his surviving wife, was dissolved by the death of the former. The survivor was then seized of one undivided half thereof, which she holds by purchase, and the heirs of the deceased of the other half, which they take by descent. One half of said community, at its dissolution, fell into the succession of the late *M. D. Bringier*. A succession is defined to be "the transmission of the rights and obligations of the deceased to the heirs." C. C. 867. It "becomes open by death, or by presumption of death caused by long absence, in the cases established by law." C. C. 928. It is acquired by the lawful heir, who "is called by law to the inheritance immediately after the death of the deceased person to whom he succeeds." This rule refers as well to testamentary heirs as to instituted heirs and universal legatees, but not to particular legatees." C. C. 934. "The right mentioned in the preceding article is acquired by the heir by the operation of law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it." "Thus children, idiots, those who are

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ignorant of the death of the deceased, are not the less considered as being seized of the succession though they be merely seized of right, and not in fact." C. C. 935. The instant the breath departs from the body of the ancestor, the heir is seized of his succession. C. C. 936, 938, 940, 941. "It is at the moment of the opening of the succession that the capacity or incapacity of the heir is considered." C. C. art. 944. The above provisions are emanations of the well known principle, "*Le mort saisit le vif.*" *Bringier's* heirs, at his death, were seized of and inherited that half to which the usufruct granted to the widow by the act of 1844 attaches, at the very instant it was inherited by the heirs of her deceased husband, to wit, the period of his death.

We will now examine the survivor's rights as usufructuary, and ascertain in what manner they may be affected by the claims either of the creditors or heirs. *Bringier* died leaving the appellant as his surviving wife, and nine heirs, five of whom are of age, and four minors, under the natural tutorship of appellant. A community of acquets and gains existed between the deceased and his surviving wife, the value of which amounts to more than a million of dollars, and the debts to \$88,309 94; and to the question of law we will assume that the crops, revenues, etc., of the community, accruing since its dissolution, amounts to the like sum of \$88,309 94. The widow, qualified as administratrix of his estate, and has always been in the possession of all the property belonging thereto and to the community. Under the act of 25th March, 1844, she is to be viewed as an usufructuary under an universal title. C. C. 1604, 580. The law which governs her rights, as such, is to be found in arts. 577, 578, 579, 580, 581 C. C.

Suppose that the widow should come forward, and, out of her own funds, pay those debts. How would she then stand towards the heirs of her husband? As a creditor for the sum of \$44,154 97, to be reimbursed at the termination of the usufruct, without interest, as by that advance she prevents the sale of so much of the property subject thereto as would be necessary to extinguish that amount of debt, and thereby reaps the profits etc. thereof. If the heir makes the advance, *interest is due to him*, as by means of that advance the usufructuary enjoys the fruits etc., of the property, the alienation of which the advance has avoided. If neither the heir nor usufructuary furnish the funds necessary to pay the creditors, a sale then takes place of so much of the property subject to the usufruct as may be requisite to extinguish the contribution under art. 580.

Let us suppose another case: A dies in the month of September, leaving several heirs, and a sugar plantation worth \$200,000. He bequeaths the usufruct of one half of his property to B. A few days after A's death, his heir qualifies as executor; B immediately demands the delivery of the estate subject to the usufruct. Within three months from this demand of delivery, a crop of sugar worth \$20,000 is made, which belongs to B, according to art. 538 C. C., which provides that "the natural fruits, or such as are the produce of industry, hanging by branches or by roots at the time when the usufruct is open, belong to the usufructuary; and fruits in the same state at the moment when the usufruct is at an end, belong to the owner." The amount of the debts of A's succession is \$20,000. The executor pays these \$20,000, with the proceeds of the crop. B dies a short time after. What can his heirs claim from the estate of A? Why the reimbursement of the half of the revenues, to wit, \$10,000, without interest, which sum the executor appropriated to the payment of the debts, such appropriation being equivalent to an advance on the part of B, the return of which, at the termination of the usufruct, is dictated by art. 581.

A third example can be put: A dies, leaving a surviving wife in community, and an heir of age, and a minor heir. The community is entirely free from debt. The succession is accepted unconditionally by the heir of age, and under benefit of inventory for the minors. There are debts due the estate: the heir of age qualifies as administrator, and proceeds to reduce them to possession. During the interval between the death of A and the rendition of the final account of administration, the fruits of the community property received by the administrator amount to \$10,000. To whom is the administrator to account for those revenues? Why, to the widow of A, most assuredly, who is entitled to half of that sum in her own right, as owner of one half of the acquets, and to the other half as usufructuary, under the act of 1844. Yet, according to the doctrine contended for by appellees, the half of that sum would belong to the heirs, and would constitute merely a fund, to the civil fruits of which only the survivor would be entitled. Such a doctrine is at variance with the provisions of our Code, and would, were it to obtain, defeat the very object of the act of 1844, which was

not passed solely with a view to protect the surviving parent from the demands of heirs who may become emancipated by marriage, or attain their majority after the dissolution of the community, but also for the purpose of affording the surviving husband or wife a respectable maintenance out of *that property*, which the law considers "*as the produce of the reciprocal industry and labor of both.*" C. C. art. 2371.

To show the consistency and equity of the principle urged by the appellant, and the harmlessness of its operation, either as to the heirs or creditors, I will introduce another example. A's succession consists of community property, valued at \$100,000. The debts of the community amount to \$10,000, with eight per cent interest from his death. The revenues for the first year amount to \$10,000, which the administrator paid over to his surviving wife. The creditors, at the end of the year, press their claims, which amount, in principal and interest, to \$10,800. To avoid the sale of any part of the property, the surviving wife and usufructuary advances that sum. She contracts a second marriage, which, by the proviso of the act of 1844, puts an end to the usufruct. What can she, as usufructuary, claim from the heirs of A? Only the sum of \$5000, without the interest of \$400, the other \$5400 having extinguished half of the debts for which, as partner in community, she is personally liable. The reason is obvious: the right of the heir to sell a part of the property subject to the usufruct, sufficient to meet the sum for which that property is liable, and the obligation of the usufructuary to submit to that sale, or make the advance required by articles 580, 581, were coeval with the opening of the succession. The usufructuary having enjoyed the fruits and revenues of so much of the property as might have been sold at that period, at the instance of the heir, and not having at that time made the advance, which would have prevented the accumulation of interest, her claim for \$400 is compensated by the fruits of that portion of the property, of which, had she refused at the first of the year to make an advance, she would have been dispossessed by a forced sale.

It is evident, from arts. 577, 578, 579, 580, 581 of the Civil Code, that the right of usufruct conferred by the act of 1844, accrued at the very moment of the dissolution of the community, and that there is nothing incompatible between the existence of debts due by it, and the exercise of that right from that period. The articles cited expressly and amply provide for such a case, and the fallacy of the appellees' proposition consists in the idea that the interest of the usufructuary cannot be placed under the charge of the administrator, accountable for the revenues and fruits received by him, and that nothing, save what may enure to the benefit of the heirs, can be the object of his solicitude. This, I apprehend, would place the surviving usufructuary under an universal title, in a worse position than a legatee under a particular one, who can claim the proceeds, and interest, of the thing bequeathed, from the day the demand of delivery was formed, C. C. 1619; and, if it be the legacy of an annuity or pension bequeathed by way of maintenance, from the day of the decease, without having brought suit for the same. C. C. 1624. To the latter bequest the act of 1844 can be assimilated, as its object, as has been already stated, was to afford a proper maintenance to the surviving spouse.

The issue before the court is one between the appellees, heirs of *Bringier*, and the widow, as usufructuary under an universal title, and is confined to them. The question is, *as regards the heirs*, what are the rights of the usufructuary to the revenues etc., of that half of the community by them inherited? The solution of that question is found in the Code, art. 577 to 581. The ownership of the heirs of *Bringier* in said property is an imperfect one. They possess the mere ownership (*la nue propriété*) of half the community, of which half the surviving partner has the *domaine utile*. C. C. arts. 481, 482. The demand of the heirs that the revenues of the community be applied to the payment of the debts, is based upon the assumption that they were seized of the perfect ownership, the *jus duplicatum* or *droit droit* to one half of the community property; when, in fact, between them and the appellant, they inherited the mere ownership, *la nue propriété*, to one half of the acquets, the act of 1844 vesting the *domaine utile* in the surviving partner at the dissolution of the community.

To conclude: It is contended on behalf of the appellant: 1. That, at the death of *Bringier*, his heirs were seized of, and inherited one half of, the community. 2. That to that half the usufruct of the surviving partner attached, at the dissolution of the community. 3. That, as regards the surviving partner, the heirs have but a mere right of ownership to the half of the community. 4. That, as



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between the surviving partner and heirs, the latter have no right to demand that the revenues of the community, received since its dissolution, be applied to the payment of the debts. 5. That the heirs can only demand a sale of the property to pay the debts, when the usufructuary makes no advance. 6. That that advance is not obligatory on the part of the usufructuary, and that, in the absence of that advance, the heirs must make it, or submit to the sale. 7. That the revenues of the community since its dissolution are to be accounted for to the usufructuary.

The judgment of the court (*Eustis*, C. J. dissenting,) was pronounced by

KING, J. *M. D. Bringier* died in 1847, leaving a large succession, the greater part of which consisted of community property. His widow, who is the administratrix, applied for a sale of a part of the moveables, slaves, and lands of the succession, for the purpose of paying the debts of the community, amounting, as it is alleged, to a sum exceeding \$88,000. Two of the heirs opposed the sale as being unnecessary, and alleged that the revenues derived from property of the community, since the opening of the succession, have been sufficient to discharge all the debts, and should be applied to that purpose. To this opposition the surviving widow answered, that one half of the crops, fruits, and revenues yielded by the community property since the death of her husband, belong to her in her individual right, as the surviving partner in community, and the other half, in virtue of her usufructuary rights under the act of the 25th March, 1844, and cannot be appropriated to the payment of the community debts. The opposition of the heirs was sustained; and, from the judgment dismissing the prayer for a sale, *Mrs. Bringier* has appealed.

It is conceded, for the purposes of this suit, that the debts amount to the sum stated in the petition, and that the revenues from the community property, since the death of *M. D. Bringier*, have been sufficient to discharge them. It is also admitted that, if the revenues be not applicable to the payment of the debts, a sale of the property specified in the petition will become necessary.

The question presented is, whether, under the act of 1844, the surviving widow is entitled to the usufruct of the share of the deceased in the community property, from the moment of the husband's death, and previous to paying the debts; or whether the debts must be first discharged, and the right exercised upon the residue. The second section of the act provides, "that in all cases where the pre-deceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed, by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in said community property as may be inherited by such issue; provided, however, that such usufruct shall cease whenever the survivor shall enter into a second marriage." Acts of 1844, p. 99.

The provisions of this section were considered in the case of the *Succession of Fitzwilliams*, lately decided. 3 An. Rep. 489. We there said that: "The usufruct created by the statute was to be governed by the rules established by the Code on the same subject. At the death of the wife, the rights of the parties respectively were fixed by law. The survivor had his election either to sell community property to a sufficient amount to discharge the debts promptly, and to exercise his usufructuary right upon one half of the residue; or, if he preferred to preserve the property unsold, he could do so, on paying the debts himself, or on assuming them, thereby relieving the heirs from the burthen of interest, which might ultimately absorb their entire inheritance. In the latter event, the usu-

fructuary is entitled to the entire fruits produced by the property ; the fruits of the property preserved from sale being deemed equivalent to the interest on the sums advanced. C. C. arts. 578, 579. But he cannot retain the property, leave the debts unpaid, to the prejudice of the heirs, and return it to them at the expiration of the usufruct, encumbered with the additional burthen of interest which may have accrued in the mean time."

We do not think that the fact of the surviving wife having taken out letters of administration in any manner affects her usufructuary rights. Those rights depend upon the statute, and upon the provisions of our laws regulating usufructs. By the terms of the statute, the survivor takes the usufruct of so much of the share of the deceased in the community property as may be inherited by the heirs. That share consists of the one half which belonged to the deceased, subject to the debts. With that encumbrance it descends to the heirs, from the instant of the ancestor's death. The right of the survivor to the usufruct of that inheritance attaches, at the same moment that the right of property accrues in favor of the heirs. Both rights spring out of the same event, and attach to the same property—that is, to half of the community subject to its debts ; and, with this burthen, the survivor takes it.

The interpretation contended for by the appellees would suspend the exercise of the usufructuary right until the debts were discharged, and then limit it to the residue. This position is not supported by the terms of the statute, and conflicts with the rules which govern usufructs. It could only be maintained on the ground that, the existence of debts was incompatible with the exercise of the usufruct ; but no such incompatibility exists. On the contrary, our laws provide amply for that contingency, and permit the usufructuary in such cases to retain the whole property, and receive its fruits, on making the necessary advances to discharge the debts, which advances are to be reimbursed without interest, at the termination of the usufruct ; or to sell property to an amount sufficient to discharge them, unless the heirs will make the advances, and to exercise the right upon the residue. C. C. arts. 578, 579.

Neither the statutes, nor the enactments of the Code in relation to usufructs, present any impediment to the survivor's right attaching fully from the moment of the death of one of the parties ; nor is the exercise of the right inconsistent with that of the heirs, or of the creditors, to insist on a speedy adjustment of the debts of the community, and on a sale of property for that purpose, if it be necessary.

Under our view of the law, *Mrs. Bringier*, as surviving widow, is entitled to the fruits produced by the community property since the death of her husband, and is only answerable for such interest as may have accrued in the mean time from unnecessary delays which she may have caused in discharging the debts with which it is encumbered.

We think, therefore, that the oppositions of *Kenner* and wife, and of *Trist* and wife, should have been overruled, and that the judge should have proceeded to order a sale.

It is therefore ordered that the judgment of the District Court be reversed, and that the opposition of *D. F. Kenner*, and his wife *Nanine G. Bringier*, and of *H. B. Trist*, and his wife *Elizabeth R. Bringier*, be dismissed. It is further ordered that the cause be remanded, for such further orders and proceedings as may be necessary to effect sales of property belonging to the succession in community between the widow and heirs of the late *Michel D. Bringier*, deceased, to an amount sufficient to pay the debts of said community, reserving the question

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of *Mrs. Bringier's* liability for the interest which may have accrued on said debts, since the dissolution of the community; the appellees paying the costs of this appeal.

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### PLAYER v. TARKINGTON, Sheriff, et al.

Where the right of parties who represent a corporation is not contested in the court below, it cannot be examined on appeal.

Where a mortgage is not re-inscribed on the books of the register of mortgages within ten years from the date of the first inscription, the inscription will cease to have effect.

**A** PPEAL from the District Court of Madison, *Selby, J. Amonett*, for the plaintiff. *Stacy and Sparrow*, for the appellants. The judgment of the court below was pronounced by

EVRIS, C. J. The plaintiff had an injunction against further proceedings under an order of seizure and sale of a tract of land, situated in the parish of Carroll, issued in the suit of the Bank of the United States against *James Erwin*. The latter appeared in the district court, and joined the plaintiff in his action. The district court made the injunction perpetual, and decreed the judgment against *Erwin* and the mortgage which it enforced, to be annulled. The parties representing the bank of the United States have appealed. Their right to represent the bank was not contested in the court below, and we think, cannot be examined on the appeal.

The plaintiff alleges himself to be a purchaser from *Erwin*, of the land on which the mortgage was originally given. The bank had obtained judgment against *Erwin*, as a third possessor of it, ordering the land to be seized and sold to satisfy the debt due to the bank from the mortgagor. Pending this litigation, *Player*, the plaintiff, made his purchase, and to prevent the sale of the land under this judgment, the present injunction was granted. The mortgage and note which it secured bear date on the 4th February, 1836; the latter is payable on the 1st January, 1839. The mortgage has lost its effect for want of reinscription within the ten years. See the case of *Hyde v. Bennett*, 2 An. R. 799.

We see no sufficient ground for annulling the judgment rendered against *Erwin*, and the judgment of the district court must be changed in that respect.

It is therefore decreed that, the part of the judgment of the district court, annulling the judgment against *James Erwin*, mentioned in the pleadings in this case, be reversed, and, in other respects, that said judgment of the district court, be affirmed; the defendants paying the costs in the district court, those of the appeal to be paid by the defendants and *James Erwin*, each for one half.

### REYNOLDS et al. v. ROWLEY et al.

By the common law, as with us, powers of attorney are subject to strict interpretation; and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect. Language, however general, when used in connection with a particular subject matter, is presumed to be used in relation to that matter, and must be construed and limited accordingly.

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A general power to buy property for the principal, or to make any contracts and do any other acts whatever which he could if personally present, by the common law, as well as by our law, must be construed to apply only to buying or contracting in connection with his ordinary business, and will not authorize the making of any contracts of an extraordinary character.

A power of attorney executed by a single woman, so far as it confers powers beyond the administration of a plantation belonging to her, with the management of which the agent was charged, will be revoked by her subsequent marriage.

Advances for the principal, made to one who had acted as an agent, but subsequently to the termination of his agency, cannot be recovered from the principal, unless shown to have inured to his benefit.

**A**PPEAL by the plaintiffs from a judgment of the District Court of Concordia, *Barry, J.*, rendered on the verdict of a jury. *Elam and Thomas*, for the plaintiffs. *Sparrow, A. N. Ogden, Prentiss and Finney*, for different defendants. The judgment of the court was pronounced by

ROSE, J. Our attempt, when this case was last before us (2 An. 890), to arrive at a final decision of it, by settling in advance the legal principles on which it turns, and remanding it to be tried before another jury on the issues of fact, has signally failed. An inquiry into the causes of that failure will make the errors of the last verdict apparent, and enable us to replace the parties in their true position towards each other.

We stated in the opinion then delivered, the probability of there being something due to the plaintiffs over and above the proceeds of the crops which they had received. The case was remanded to ascertain the amount of this indebtedness, and the rules we laid down had exclusive reference to what we considered the sole issue to be tried. The verdict of one cent in favor of the defendants, had been immediately remitted, and it was not pretended on the appeal that they had any claim in reconvention. Under that state of facts, we said that, in order to bring the advances made by the plaintiffs within the power of attorney given to *Sprague*, it was necessary that they should have been made, in good faith, for the Marengo plantation, and not for *Sprague* or any one else. We considered farther that, if it was not shown that the advances claimed had inured to the benefit of the defendants, the want of good faith might be inferred, if they were too large, under the true intent and meaning of the mandate.

These rules were applied, because we took as true the allegations upon which this action is based, that the plaintiffs were the factors of the defendants and of the Marengo plantation, and not of *Sprague*; that they acted in that capacity before the appointment of the latter as agent, and had made to the Marengo plantation large advances; and that they continued to act as such after his appointment, and to keep their accounts with the Marengo plantation as before. Under those allegations, we could not view them as third persons dealing on the faith of the agent's authority. We held them to be factors, having a minute knowledge of the wants of their principals, and making advances to the agent of those principals for the purpose of supplying those wants.

On the return of the case to the district court the claims in reconvention were first seriously urged by the defendants, and the rules laid down by the court were applied to this new issue, and thus carried beyond their legal import. This defence succeeded with the jury, and the case is now before us on the appeal of the plaintiffs from a judgment in reconvention, rendered in favor of the defendants for large amounts. The advances to which we had reference were those made over and above the proceeds of the crops which the plaintiffs had received, and,

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in relation to them, we do not know that there was error in our view of the law. But that view was not intended to apply, and was not applicable, to the claim in reconvention. After the appointment of *Sprague* as agent, the plaintiffs were bound to account to him every year for the proceeds of the crops; and, in whatever shape he received them, those proceeds cannot be considered as advances. They were payments made by the factors, for which *Sprague's* powers of attorney would be a full guarantee to them, even if the funds had been misapplied. But we are satisfied that they were not. If they had been, the defendant, *Mrs Rowley*, would not have alleged in her answer, as she did, that the plaintiffs received from *Sprague* \$20,000 and upwards, to be credited on their account. If, through the mismanagement of *Sprague*, the plaintiffs have become indebted to this defendant in the sum now claimed, it is not to be believed that *Rowley* would have paid *Sprague*, his wife's share of the price of the Marengo plantation when he purchased it, and that the defendant herself would have borrowed money on mortgage to make that payment. The *remittitur* entered by the defendants in the former trial, cannot be viewed otherwise than as an admission that nothing was due them. These facts are utterly inconsistent with the claims in reconvention now set up, and we have not changed our opinion that there is no serious issue in the cause except that which involves the indebtedness of the defendants. That issue must, in a great measure, depend upon the extent of *Sprague's* authority. The counsel of the defendants contend that *Sprague's* agency was limited to the administration of the affairs of the Marengo plantation, and that, in estimating the reasonableness or otherwise of the advances made by the plaintiffs, the necessities of the plantation must be taken as the standard; while those for the plaintiffs maintain that *Sprague* had all the power necessary to a general administration of the property of his constituents, including the Marengo plantation, and also full power and authority to sell, mortgage or pledge the crops, to obtain advances of money or other things on the same, to give notes, draw bills, sign receipts or acquittances, to sell, loan, borrow, buy, or in any other way contract, in the name of his principals, and for their individual uses.

We have already stated the peculiar position in which the plaintiffs stood towards the defendants. But we will examine this question without reference to that circumstance. We take it for granted that, under the common law as with us, powers of attorney are subjected to a strict interpretation, and that the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect; that language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and therefore is to be construed and limited accordingly; that a general power to buy property for the constituent, or to make any contracts, and do any other acts whatever, which he could if personally present, must be construed to apply only to buying or contracting connected with his ordinary business, and would not authorize any contracts of an extraordinary character to be made. Story on Agency, sec. 68, 62, 21.

The ordinary business of the defendants was planting. Their main object was undoubtedly to secure supplies for the Marengo plantation, and to provide for its administration and the payment of its debts. This was the subject matter of the powers of attorney, and the presumption is that the general language used was to be understood in subordination to that matter. It is shown that the Marengo plantation owed, at that time, a debt of about \$15,000. We must presume that

it was principally in relation to that debt, that those extensive powers to make financial arrangements were given; and the power to buy must be limited to buying for the uses of the plantation.

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The plaintiffs' counsel contend that the words, "*to do and perform for us and in our names, or in his own name as agent for Marengo plantation,*" do not import a restriction of his agency to that plantation, but must be understood, as they were used, to designate the name in which he should conduct the affairs of the agency; and that he had ample authority to raise funds for the private use of his principals, as well as for the use of the Marengo plantation. He contends that the defendants have thus understood and executed the mandate, by raising funds for their individual use through the agency of *Sprague*.

On the former appeal we thought that the power of attorney would, to a limited extent, bear that construction, and that if any part of the advances claimed were shown to have been made for the private use of any of the constituents, they would be bound to reimburse the plaintiffs, under the limitations stated in the opinion.

It is urged that the defendants had private debts which were paid out of the funds advanced by the plaintiffs, and that their family expenses during the continuance of the partnership were also defrayed out of those advances. This is probably true. But the difficulty which this case presents arises from the fact, that the amount advanced for the private use of each of the defendants is not shown, and that there is nothing in the powers of attorney which authorized the plaintiffs to charge those advances to the partnership, as they have done.

The power of attorney of *Jane Rowley* was executed in the State of Mississippi, and that of *James Kempe*, in the State of Kentucky. They were distinct acts, showing no privity between the mandators. The authority in both was the same, so far as it related to the Marengo plantation. But the authority given by each to borrow for the private use of the constituent, could not make the loans obtained under it partnership debts. The taxes and other expenses incurred for the lands of *James Kempe*, in Mississippi, for instance, could not be charged to the Marengo plantation, though they might have been included in the general account, provided the entry showed who was responsible for them. The largest sense in which the powers of attorney can be understood is, that *Sprague* was to act in his own name, as agent of the Marengo plantation, in all matters relating to the partnership, and, in the individual names of the constituents, when attending to their private affairs. This was the only authority which the mandators could give, without an express agreement that the Marengo plantation should be responsible for all their private debts.

There is another difficulty in the way of the plaintiffs' recovery upon the accounts filed in this suit. The power of attorney of *James Kempe* expired by his death, in February, 1835, and that of *Mrs. Rowley*, so far as it conferred powers beyond the administration of the Marengo plantation, was revoked by her marriage, in April, 1834. After the agent ceased to have authority, the advances made to him, on their behalf, must be shown to have inured to their benefit, before they can be charged with them.

The proceeds of the crops being much more than sufficient to pay all the expenses of the plantation, and the items stated in the accounts as being due by the defendants individually, the plaintiffs are placed in this dilemma: if the amount of the accounts is claimed for advances made to the Marengo plantation, the amount is so unreasonable as to justify the belief that the advances were not made in good faith; if, on the other hand, that amount is claimed as advances

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made for the private use of the individual partners, and the powers of attorney when in force were sufficiently ample to authorize them, we have no means of ascertaining the separate indebtedness of each of the defendants on that account; and it is not shown that the advances made to *Sprague*, after the expiration of the powers of attorney, inured to their benefit.

After an anxious examination of the evidence, and notwithstanding our impression that the equity of the case is with the plaintiffs, we have come to the conclusion that they have failed to substantiate the allegations of their petition, and that, as there is no reason to believe that further evidence can be obtained, the case should now be closed.

The tutrix of the heirs of *James Kempe* has alleged that *Sprague* placed in the hands of the plaintiffs the sum of \$8,000 to be credited to the heirs of *Kempe* on their account, which the plaintiffs received and converted to their own use; she prays a judgment in reconvention for that sum. It is not shown that *Sprague* had in his hands any funds belonging to *James Kempe*, at the time of the alleged payment. The evidence, on the contrary, goes to show that the \$20,000 deposited by him with the plaintiffs his exclusive property; and, as it is admitted that he received from the plaintiffs the advances claimed for which he is personally liable, if the defendants are not, the plaintiffs had a perfect right to convert that sum to their own use. When it was paid to them, *Sprague* was no longer the agent of the heirs of *Kempe*, and could do no act for them.

The premises considered, it is ordered that the judgment in this case be reversed. It is further ordered that the claim of the plaintiffs, and that of the defendants in reconvention, be both disallowed; and that there be judgment in favor of the defendants, with costs in both courts.

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#### FLYNN v. MOORE.

The acknowledgment by the purchaser, in an act of sale of real estate, of possession of the land sold, refers exclusively to the possession which the vendor had. If a third person were in possession at the time, and the vendor conceals that fact from the purchaser, he is guilty of a fraud, which will entitle the purchaser to relief, notwithstanding his acknowledgment.

That the law (C. C. 2455) considers the delivery of immovable property as always accompanying the public act which transfers it, is true, so far as the vendor is concerned, and every obstacle afterwards interposed by him to prevent the corporeal possession of the purchaser is a trespass; but this does not release him from the obligation of actual delivery of the thing sold, when in possession of another at the time of the sale.

The vendor of a lot of ground who was aware, at the time of the sale, that a part of the lot was claimed by, and in possession of, a third person, though he subsequently offers to take back the property, refund the price, and pay for the improvements, has no claim against the purchaser before delivering the entire thing sold. C. C. 2450. The latter is not bound to accept his offer to take back the property, and refund the price, and pay for the improvements.

**A**PPEAL from the District Court of Jefferson, *Clarke, J. Michel*, for the appellant. *Jourdan*, for the defendant. The judgment of the court was pronounced by

*Rost, J.* The defendant had sold to the plaintiff a town lot, for twelve hundred dollars; \$300, cash, and the remainder in three notes, of \$300 each. The plaintiff having failed to pay those notes at maturity, the defendant took out an order of

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seizure and sale, which the plaintiff enjoined on the following grounds: That one-half of the lot was at the time he purchased it in the possession of *John H. Martinstein*, who claimed it as owner, to the knowledge of the defendant, who fraudulently concealed that fact from him; that the city surveyor, having knowledge of the title and possession of *Martinstein*, has refused to put him, the plaintiff, in possession of the lot, and that the defendant has acknowledged the existence of an adverse claim. The prayer is that the injunction prayed for be made perpetual, and the plaintiff dispensed from paying his notes, until the defendant shall put him in possession of the portion of the lot claimed, and occupied, by *Martinstein*. The answer is a general denial, and an averment that, when the defendant was informed of the claims of *Martinstein*, he offered the plaintiff to take back the property and refund the price, and also to pay for the improvements. The defendant prays that the injunction be dismissed, with damages. There was judgment in his favor in the first instance, and the plaintiff appealed.

We think this judgment unauthorized by law. Although *Martinstein* did not enclose the portion of the lot in controversy till after the purchase by the plaintiff, it is proved that he was in possession of it, to the knowledge of the defendant, through his agent *Samuel Moore*. The defendant, therefore, has not delivered the thing sold as, under art. 2450 C. C. he was bound to deliver it. The district judge erred in holding the plaintiff bound by his acknowledgment in the act of sale, that he considered himself in possession; that acknowledgment referred exclusively to the possession which the vendor had; if a third person was in possession at that time, and the defendant concealed that fact from the plaintiff, he was guilty of a fraud, which entitles the plaintiff to relief, notwithstanding his acknowledgment.

It is urged that the law considers the tradition or delivery of immovable property as always accompanying the public act which transfers the property. C. C. 2455. This is true, so far as the vendor is concerned; and every obstacle which he afterwards interposes to prevent the corporeal possession of the buyer, is considered as a trespass. But he is not dispensed from the actual delivery of the thing sold, when it is in the possession of another at the time of the sale.

The plaintiff was not bound to accept the offer of the defendant. He has a right to insist upon the specific performance of the contract; and the defendant has no claim against him, before the delivery of the entire thing sold.

It is therefore ordered that, the judgment in this case be reversed. It is further ordered that the injunction sued out by the plaintiff be reinstated, and that it remain in force until the defendant shall put the plaintiff in possession of the portion of ground sold to him, and now claimed and occupied by *John H. Martinstein*. It is further ordered that the defendant pay the costs in both courts.

#### LINTON et al v. STANTON.

The act of Congress of 19 August, 1841, establishing an uniform system of bankruptcy, does not require that an appellant should file, after the decree declaring him a bankrupt, a separate petition for a discharge, under the penalty of nullity of the subsequent action of the court, as against creditors. A prayer for a discharge, in the original petition of the bankrupt, is sufficient. Sec. 4.

A plea that defendant had been discharged from his debts, under the stat. of 1841, as a bankrupt, will not be affected by the fact that no order appears in the transcript from the bank-



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rupt court, designating the time and place at which the creditors were required to appear, nor the newspapers in which the publication of notice was to be made. *Per Curiam*: The act requires that the newspapers shall be designated by the court, but not that the designation shall be made by a formal order of record in the case. It might have been made by a general order applicable to all bankrupt notices.

Where the judgment of a court, sitting in bankruptcy, declares that the notices required by the stat. of 1841 were published in proper form, such publication must be assumed to be true, by another court called upon to question collaterally the validity of the decree.

Sec. 4 of the stat. of 19 August, 1841, which gives the right of personal notice to a creditor whose residence is known, does not require a formal judicial process, and a return of service by the marshal; the service might have been by letter. The mode of service was a matter to be prescribed by the court, in its discretion.

Though a transcript of the proceedings under the bankrupt act of 1841, offered in evidence by one who sets up her discharge under the statute in defence to an action, does not show personal service on a creditor entitled to it under the act, the decree discharging him will not be declared null on that account.

A promise to pay a debt, from which the party had been discharged as a bankrupt, must be express, distinct, and unequivocal. The intention of the bankrupt to bind himself, must be clear.

A plea that certain notes sued upon, having been executed before the bankruptcy of the party, were secured by a deed of trust of real estate, and that plaintiff had received payment by purchasing the property and paying for it with the notes, is not inconsistent with a plea by defendant of his discharge as a bankrupt.

On an application for a new trial, on the ground of newly discovered evidence, it must clearly appear, not only that the discovery has been made since the trial, but that the party "had used every effort and diligence in his power" to procure the necessary testimony previously. C. P. 561.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Stocketon and Steele*, for the appellants. *Benjamin and Micou*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon two promissory notes of the defendant's, due in 1841 and 1842. The prominent ground of defence is, a discharge in bankruptcy under the act of Congress.

In support of this plea, the defendant offered in evidence a transcript certified by the clerk of the district court of the United States for the southern district of Mississippi. The certificate declares that the transcript is a full, true and complete one, "of the petition in bankruptcy of *Frederic Stanton*, of Adams county, filed by him in this court at the date above stated, with all schedules and inventories, and all amendments to schedules and inventories, thereunto annexed, and of all proceedings thereupon had in this court, as the same remain on file and of record in my office." To this certificate is appended the usual certificate of the United States district judge.

By the transcript it appears that, on the 21st July, 1842, *Stanton*, a resident of that district, filed, in the said United States district court, his petition in bankruptcy. It is in the usual form, and concludes with a prayer that he may, by decree of the court, be declared a bankrupt according to the provisions of the act of Congress in such case made and provided, and that such further order and proceedings may be taken as are provided for, required, or directed, in and by the said act of Congress. To this petition were appended the usual oath and schedules. Then follows a decree in the cause, rendered and signed by the judge, on the 8th November, 1842, of the following tenor:

"Present: The honorable *Samuel Gholson*, district judge. In the matter of the petition of *Frederic Stanton*, to be declared a bankrupt, and to be discharged from his debts. No. 396.

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Upon reading the petition, with the schedules and inventories thereto annexed, of *Frederic Stanton*, of the county of Adams, in this district, filed the 21st day of July, 1842, and upon reading and filing due proof of the publication of notice of the presentation of said petition, pursuant to the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved August 19th, 1841, and upon motion of *Messrs. Quitman and McMurran*, solicitors for the petitioner, it is ordered that the said *Frederic Stanton* be, and he is hereby, declared, adjudged, and decreed a bankrupt, according to the provisions of the said act of Congress."

Next follows a decree rendered and signed on the 21st day of February, 1843, of the following tenor:

"Present: The honorable *Samuel J. Gholson*, district judge.

In the matter of the petition of *Frederic Stanton*, of Adams county, a bankrupt, to be discharged from his debts. No. 396.

Whereas, on the 21st day of July, 1842, the above named *Frederic Stanton*, individually, and as a member of the firms of *Buckner, Stanton & Co.*, *Stanton, Buckner & Co.*, and *M. B. Hamer & Co.*, filed his petition in this court, praying that the said *Frederic Stanton* might be declared a bankrupt and be discharged from his debts; and was, on the 8th day of November, 1842, by decree of this court, duly declared a bankrupt.

Now at this day, to wit, on the 21st day of February, 1843, upon reading the said petition, with the schedule and inventory thereunto annexed, together with the said decree above mentioned, and due proof of publication of notices of the final hearing of said petition, it appearing that the said *Frederic Stanton* has fully complied with the provisions of the act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved August 19th, 1841, and is entitled to be discharged from his debts. It is therefore ordered, adjudged, and decreed, that the said *Frederic Stanton* be, and he is hereby, by virtue of the act aforesaid, fully and entirely discharged from all his debts.

In testimony whereof, I, *Samuel J. Gholson*, judge of the district court [L. s.] of the United States for said district, have signed these presents, and caused the seal of the court to be hereunto affixed.

(Signed) S. J. GHOLSON, district judge.

Before considering the objections raised by the plaintiffs to the validity and binding force of these proceedings, it is proper briefly to notice the prominent provisions of the act of Congress pertinent to this controversy, premising that the plaintiffs' counsel does not question the constitutionality of that law, nor the jurisdiction of the district courts of the United States to entertain the application of *Stanton*. The statute contemplates that the jurisdiction should "be exercised summarily," and without the rigorous observance of the formalities incident to proceedings at common law. It also enacts that the proceedings in all cases of bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered, in the office of the court, and a docket only, or short memorandum, thereof, with the numbers, kept in a book by the clerk of the court. It also vests in the district judges a very large discretionary power, authorizing the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; directing them, in all such rules, regulations and forms, to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and facilitate the use thereof by the public at

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large. It directs that the discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts etc., of such bankrupt, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud, or wilful concealment of the property, on the part of the bankrupt. It directs that a copy of any decree in bankruptcy, and the appointment of assignees, shall be recited in every deed of lands belonging to the bankrupt conveyed by the assignees under this act, and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited. It directs petitions for the benefit of the act to be published in one or more newspapers of the district, to be designated by the court, and contains a similar direction for the publication which is to precede the discharge, calling upon all persons in interest to show cause against its being granted. It provides that in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, *as in their discretion shall seem proper*, having regard to the distance at which the creditor resides from such court.

This brief review of the statute will serve to indicate the policy and spirit of the law with regard to the mode of proceeding, and the power of the district courts of the United States in matters of bankruptcy. It is not our province to question the wisdom of this legislation, by which so large a grant of power is made, and so wide a departure from the ordinary rules of proceedings is directed, or sanctioned.

With these preliminary observations, we proceed to consider the objections made at bar to the validity and binding force of the proceedings under which the plaintiffs demand the rejection of the defence.

It is said that, by the terms of the 4th section, the bankrupt was bound to present a petition to the court, praying for his discharge and certificate, and that no such petition was ever filed by *Stanton*. An examination of the 4th section of the statute has not satisfied us that it is indispensable that the petition for a discharge should be filed after the decree, under the penalty of nullity of the subsequent action of the court, as against creditors. Such a conclusion is not necessarily deducible from the language of the law. It is inferrible from the record, which we have quoted in detail, that the district judge construed the broad language of the original petition as containing a prayer, not only to be decreed a bankrupt, but to be allowed the full benefit which the statute contemplates, and which was its main object; and it is not for us to say that the district judge of the United States erred in so holding, and pronounce an absolute nullity, which is not declared in the terms, and is inconsistent with the spirit, of the statute.

The next objection is that, no order appears of record, designating the time and place at which the creditors should be required to appear, and the newspaper in which the publication should be made.

The act of Congress states that the newspaper shall be *designated* by the court, but it does not in terms require that the designation shall be made by a formal order of record in the cause; and the strictness which is invoked by counsel seems to us inconsistent with the provisions of the 13th section, already noticed.

There is nothing inconsistent with the terms and spirit of the statute, in supposing that the district court, under its power to make rules and regulations, may have designated, by a general order, one or more newspapers in which bankrupt

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publications should be made. Such general order would not of course form part of the record in this cause, and would not be inserted by the clerk in his transcript.

That notices were published, and in proper form, must be assumed as true, unless the solemn judgment of a court of competent jurisdiction, which declares that they had been, be pronounced false by another court, called upon to question collaterally the validity of the decree.

But it is said that the *proviso* of the 4th section gives the right of personal notice to the creditor whose residence is known, as was the case in this instance. It is clear that, under the proviso, a formal judicial process and a return of service by the marshal, were not necessary. The service might be by letter, and the mode of service was a matter to be prescribed by the court, as in its discretion should seem proper. It would be inconsistent with the general spirit of the statute, the peculiar nature of the proceedings as contemplated by it, the large discretionary power vested in the district judges, and especially the strong language of the act respecting the effect of the certificate, to pronounce the nullity of the decree in question, upon the ground that the transcript of the record does not show a personal service made on *Duncan*.

The opinions we have thus expressed are corroborated by numerous authorities. The importance of the subject makes it proper to refer briefly to some of these decisions.

In *White v. How*, 3 McLean's United States Circuit Court Rep., 294, the question was whether a plea of bankruptcy was defective, because it did not set out the proceedings under which the bankruptcy was decreed. Mr. Justice McLean, after quoting the 4th section of the bankrupt law, observes: The plea is substantially good. It is not necessary to set out in such plea more than the certificate and discharge duly authenticated. The above provision makes these evidence, and conclusive evidence, unless the proceedings shall be shown to have been fraudulent.

In *Burnsids v. Brigham*, 8 Metcalf, p. 77, the question was as to the effect of the omission of the name of a creditor from the list. It was held that the mere omission of the name of a creditor, is not made by the statute a substantive ground for preventing or avoiding the discharge of a bankrupt. The plaintiff must show that the omission was wilful and fraudulent, and that, contrary to his oath, the bankrupt did know or believe that the plaintiff was a creditor, and wilfully or designedly omitted his name, because he apprehended opposition from the plaintiff, or from some other motive. To the same effect was the opinion of the Chancellor of New York, in *Hubbell v. Croup*, reported in *Western Law Journal*, vol. 2, p. 240; and of the Court of Common Pleas in New York, *ib.* vol. 1, p. 479.

In *Strader v. Lloyd*, the Supreme Court of Ohio held that, where the defendant pleads a discharge in bankruptcy, such plea is proved by the certificate alone, without an exemplification of the record. 1 *Western Law Journal*, p. 396.

In *Shelton v. Pease*, 10 Missouri Reports, it was held that failure to give notice to a creditor will not vitiate a certificate of discharge in bankruptcy. Cited in 5 *Western Law Journal*, p. 473.

In *Fox v. Paine*, 10 Alabama Reports, the court said: "We think the omission to include the debt in the schedule, and the neglect to notify the creditor of the application, is not fraudulent in itself; nor, in the absence of circumstances evincing the intention to deceive, is it evidence from which fraud may be inferred.

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It is also proper to observe that, in point of fact, one of the plaintiffs was well aware, before the discharge, that the defendant had instituted proceedings under the bankrupt act; and, in answer to the defendant's letter announcing the fact, the motives for so doing and the hopes of future advantage, the plaintiff replied with an expression of approval of the defendant's course, in terms indicating a willingness that he should obtain his discharge. "I have no idea that your recent course will have any injurious effect on your business; on the contrary, I think its effects are more likely to be beneficial."

As the certificate has not been impeached for fraud, and as the debt in question is not of that fiduciary class which is saved from the operation of the act we may here dismiss the question of the validity of the proceedings and decree of the bankrupt court.

The plaintiffs rely upon a new promise to pay the debt, for which the suit is brought, which they say is contained in a letter of the defendant, addressed to *Duncan*, one of the plaintiffs, after the bankrupt proceedings were commenced, and before the decree of bankruptcy. It has been often held that a new promise to pay a debt discharged by certificate, must be express, distinct, and unequivocal. The intention of the bankrupt to bind himself must be clear. We have carefully weighed the terms of the defendant's letter; and, even if it could be considered as containing a promise to pay that portion of his debts upon which *Duncan* was committed as his endorser, we are of opinion that it cannot be considered as covering the debts now in controversy. The subsequent letters cannot aid the plaintiffs, as they, on the contrary, exhibit a continued refusal on the part of the defendant to acknowledge himself bound, and give new obligations. See *Bach v. Cohn*, 3 An. 103, and cases there cited.

After pleading the discharge in bankruptcy, the defendant further pleaded, in a supplemental answer, that the notes sued upon, being executed before the bankruptcy, were secured by a deed of trust of certain real estate, and that the plaintiffs had received payment by purchasing the trust property and paying for it with the notes. This plea was not inconsistent with the plea of discharge, and therefore was not a waiver. Both allegations might be true, and the truth of either would bar the action. If the defendant was a duly discharged bankrupt, the personal liability was gone. If a sale of the trust property had been provoked by the *cestui que trust*, and its proceeds had been paid him, the claim itself was extinct.

After the rendition of the judgment, which was for the defendant, the plaintiffs moved for a new trial, upon the ground, among others, that the plaintiffs have discovered since the trial that the defendant, a short time previous to the filing of his petition to be declared a bankrupt, and in contemplation of bankruptcy, had given a fraudulent preference to one of his creditors. This application was supported by the affidavit of the attorney, his clients being non-residents and absent from the State. A portion of the plaintiffs are minors. The new trial was refused.

Applications for a new trial upon the ground of newly discovered evidence, are always received with great caution. It must not only clearly appear that the discovery has been made since the trial, but also, in the stringent language of the Code of Practice, that he had previously used every effort and diligence in his power. "Elle devra faire serment qu'elle ne les a découvertes que depuis le jugement, quoiqu'elle eût fait toutes les diligences nécessaires pour se procurer

des preuves pour sa défense." In the present case the showing is loose and defective on the score of diligence. C. P. 561, 560.

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STANTON.

*Judgment affirmed.*

## THE SECOND MUNICIPALITY v. CORNING et al.

Where a defendant admits his liability for a part of a claim, and pays that portion into court, for which plaintiffs take judgment, reserving their right to the balance, which is less than the amount necessary to authorize an appeal, the defendant cannot appeal from a judgment against him for the balance.

Whenever the constitutionality or legality of a tax imposed by a municipal corporation is in question, an appeal will lie without reference to the amount in dispute; but where the contest is as to the application and execution of an ordinance imposing such a tax, or the liability of an individual to pay it, the right to an appeal depends on the amount in dispute. Sec. 10 of the ordinance of the general council of New Orleans, approved by the mayor on the 16th December, 1846, establishing an uniform rate of taxes, on hawkers, merchants &c., does not authorize the imposition on each partner in a banking house, or firm, making the purchase and sale of bills of exchange its principal business, of the whole amount of the tax, without regard to his residence in the State. The tax is imposed on the business, and not upon the individual members of the firm, unless they are permanent residents, or sojourners within the State. The authority of the general council to enact that ordinance depends exclusively on the stat. of 12 January, 1842; and the power of the State itself to lay taxes only extends to persons and property within its jurisdiction.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. E. T. Parker and W. H. Hunt*, for the plaintiffs. *T. A. Clarke*, for the appellant. The judgment of the court (*Slidell, J.* dissenting as to the question of jurisdiction,) was pronounced by

**EUSTIS, C. J.** The defendants, Corning and John Egerton, are sued for the sum of four hundred dollars, under the allegation that the firm of Corning & Co. of which they are members, is liable to the tax imposed by the general council on bankers, or persons buying and selling bills of exchange, as their principal business in New Orleans. The defendants admitted the liability of the partnership to the tax, which was two hundred dollars, and tendered that amount, which was paid into court. The plaintiffs took judgment for that amount, without impairing their rights for the balance, which were expressly reserved in the judgment. A trial was afterwards had to determine the further indebtedness, and the plaintiffs had judgment against the two defendants for one hundred dollars each, and costs; from which the latter have appealed.

The mode of proceeding, by which judgment for the part of a debt acknowledged to be due may be taken, with a reservation of the rights of the plaintiff for the balance claimed, has been sanctioned in several cases. *Parsons v. Suarez*, 9 La. 413. *Small v. Zacharie*, 4 Robinson, 145. *Skinner v. Dameron*, Robinson, 447. But it is obvious that the judgment for a part of a debt leaves nothing but the remainder in dispute between the parties, and a defendant cannot call in question the judgment which he has confessed. The Code of Practice expressly prohibits an appeal in such a case. Art. 567. The amount in dispute in this suit is, therefore, not sufficient to give this court jurisdiction.

But it is contended that the appeal can be sustained, because the legality of the tax imposed is drawn in question. In the case of the *Third Municipality v. Blanc*, 1 An. R. p. 386, we held our jurisdiction to be confined to

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the question of the legality and constitutionality of taxes &c. imposed by municipal corporations; and that, as to their application and execution, such questions remained exclusively with the ordinary tribunals, this court having jurisdiction on the appeals in cases only in which the amount in dispute vested the jurisdiction. The legality of this tax can, therefore, be examined.

The ordinance imposing it is to this effect: Article 10th. All private bankers, and all persons buying and selling bills of exchange as their principal business, and all persons carrying on both the private banking and exchange business, shall pay a tax of two hundred dollars. This article is not to apply to the ordinary money and exchange brokers comprehended in the 9th article, &c.

The construction contended for by the counsel for the plaintiffs, that each partner in a banking house or firm making the purchase and sale of bills of exchange its principal business, is liable to the whole amount of the tax, without regard to the place of his residence, presents consequences which appear repugnant to all ideas of justice and sound policy. Many of these establishments are connected with others in different commercial capitals, and have numerous parties in interest in the concerns. A banking partnership would not be on the same footing with a resident banker, and where the number of partners is great would be subjected to so heavy a tax as to render its doing business in this city impossible.

The construction which the counsel for the defendant puts upon this article of the ordinance is, that it imposes the tax on the business or function, and not upon the individual members of the firm, unless they are present, and we think this construction is strengthened by other articles of the ordinance imposing taxes on theatres, &c. A reference to the statute under which the tax was laid appears to remove every doubt as to its meaning.

The power of the general council to pass the ordinance, it is admitted, depends exclusively on the act of the legislature of the 12th of Jan., 1842, which provides that; "The powers heretofore conferred on the general council of the city of New Orleans shall be so construed, as to authorize them to fix the rate that shall be levied as an annual, or other tax, or license, on and to be paid by all brokers, merchants, traders, wholesale and retail dealers, hotels, boarding houses, theatres, theatrical and other like performances, grog shops, bar rooms, cabarets and all other callings, professions, business, to be collected under the authority of the council of the different municipalities, on such persons vending within their respective limits, and exercising said callings, professions or business, and whether such persons be permanent or transient residents in the said city of New Orleans."

The authority exercised by the general council in laying taxes is derived from a special grant of power, and there is no warrant for extending this power beyond the objects specified. The acknowledged power of the State itself to lay taxes extends to the persons and property within its jurisdiction. *Brown v. The State of Maryland*, 12 Wheaton, 441. Civil Code, article 9. We have been referred to no authority shewing that it extends further. The concluding paragraph of the section of the act of 1842 quoted, seems to us to confine the power granted within its just and proper limits, and not to purport to operate upon persons other than permanent residents or sojourners. On general principles, according to the rules by which the by-laws of municipal corporations are always construed, in reference to the mode in which the taxing power has been uniformly exercised in this State, and elsewhere, as we believe, and under the statute by virtue of which the ordinance was enacted, no other construction can be given to

the article than that which is in conformity with the fair intendment of the statute itself. Under that construction, which renders residents, whether permanent or transient, to use the very words of the statute, liable to the tax for the business of banking and buying and selling bills of exchange, we find nothing illegal in the ordinance.

In establishing the true construction of the article imposing this tax, we virtually exclude every other, and decide against that which is assumed by the plaintiffs, and which has been recognized by the district court in the judgment against each of the defendants for the amount of the tax. The firm of *Corning & Co.* is established in New Orleans, and both the defendants were engaged in buying and selling exchange as charged in the petition. *Corning* resides in New York, and *Egerton* resides in New Orleans.

The tax we find to be lawful. *Corning* has been condemned to pay a tax which he did not owe, not that the tax itself was illegally imposed, but because it did not apply to him. The amount is not sufficient to enable this court to take cognizance of the appeal; the only decree we can make is, to dismiss it.

*Appeal dismissed.*

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#### FORMAN et al. v. WALKER.

An agent is a competent witness against his principal, in regard to the business of his agency.

One who purchases a bill of exchange from an agent, duly authorized to draw upon his principal, on shipment to the latter of produce purchased for him, has nothing to do with the limitations fixed by the principal as to the price of the produce, unless proved to have been aware of them.

Where an agent is authorized to ship to his principal, and to draw on him, "with bill of lading attached," it is unimportant that the bill of lading be not *materially* attached or fastened to the bill of exchange. It is sufficient that the bill of exchange be drawn on the shipment, and that the bill of lading be delivered with it to the purchaser of the bill.

**A**PPPEAL from the Third District Court of New Orleans, *Kennedy, J. Stockton* and *Steele*, for the plaintiffs. *Elmore* and *King*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiffs have sued the defendant, to recover an alleged balance due on three certain bills of exchange, drawn in Cincinnati by *John G. Wasson*, on the defendant in New Orleans, payable at sight. They were protested on presentment. An arrangement was however made, by which the produce, on which the bills were drawn, was sold in New Orleans by the defendant, the proceeds of which were applied in part payment of the bills.

The allegations on which the liability of the defendant is based, are, that *Wasson*, the drawer of the bills, was the agent of the defendant, and was employed by him to purchase oats, hay, and horses, in the western country; that he had full power to draw the bills, in order to provide funds for making said purchases; that the petitioners, having confidence in the honesty and good faith of said Walker, gave to his agent the full value of said bills, the proceeds of which were applied to the objects of said agency, for the defendant, and in accordance with his instructions; that, at the time of selling the said bills of exchange, the said agent shipped to the said defendant a large quantity of oats, which had been



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paid for with the proceeds of said bills, and transferred to the petitioners the bills of lading, as a security for their payment. The plaintiffs also charge that, throughout the whole business the defendant acted with the intention to defraud them and others; he, the said defendant, being in the habit of paying bills thus drawn, as long as the purchases made on his account turned out to be profitable. The defendant has pleaded the general issue, and charges collusion and combination between the plaintiffs and *J. G. Wasson*, with the view of defrauding and injuring him. There was judgment in favor of the plaintiffs for the sum of seven hundred and ninety eight dollars twenty five cents, with legal interest from judicial demand, until paid, and costs of suit. The defendant has appealed.

A bill of exceptions was taken to the admission of the testimony of *Wasson*, on the ground of interest. No exception was taken to any particular portions of his testimony as inadmissible; and, we think, the court did not err in admitting the testimony, under the issues between the parties. He was undoubtedly the agent of the defendant, and upon principle a competent witness.

It appears that the plaintiffs, who are merchants in New Orleans, received from a member of their house, who was at Cincinnati, bills of lading for two shipments of oats, with directions to deliver the bills of lading to the defendant, on his paying one of the bills on which this suit was brought; that afterwards, the plaintiffs received bills of lading for two other shipments, with the same directions with reference to the two other bills, which form a part of the plaintiffs' present demand. The bills of lading were tendered to the defendant on his payment of the bills of exchange, which were drawn at sight, but which he refused to accept or pay. The bills of exchange were not attached—that is, were not fastened to the bills of lading when they came to hand, but were received at the same time. The transaction, on the part of the plaintiffs, through their partner in Cincinnati, appears to have been perfectly fair, and according to mercantile usage. The bills of exchange were taken with the bills of lading, as their security, and the equivalent given for them was applied to the benefit of the defendant, in the purchase of produce.

It appears by the correspondence between the defendant and *Wasson*, that before the purchase of the bills by the plaintiffs, *Wasson* had drawn several bills on shipments from Cincinnati, in the same manner as these appear to have been drawn. The agency of *Wasson* was of the most extensive character, for the purchase of produce of this description, so far as relates to quantity; and, we think, the purchasers of bills had nothing to do with the limitations fixed by the defendant, on the prices to be paid, unless they were apprized of them. For the authority of *Wasson* to draw these bills, we think the defendant's letter of March 19th, 1847, is sufficient. The following is an extract: "Get the twenty thousand bushels you speak of; do not let them go out of your hands; oats and hay, you know, I must have. You can, if necessary, when you ship me oats and horses, draw on me, with bill of lading attached, at ten days' sight; and, if you find it necessary, at one day's sight, for not over \$1000 at one time; you might even, if compelled, draw at sight."

We think there is nothing in the objection taken by the counsel for the defendant, that the bills of exchange were not in conformity with this letter, because the bills of lading were not *materially* attached to them. It is sufficient, according to the understanding of mercantile men, that the bill of exchange should be drawn on the shipment, and that the bill of lading be delivered with it to the purchaser. It is not pretended that the defendant was not regularly apprized by

his agent of the drawing of the bills, and of the shipments against which they were drawn.

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The district judge considered this case with great care, and we concur with him in the results of his opinion. It would be against every principle of mercantile law to enable a man, under circumstances like these, after creating a credit in favor of bills drawn by his own agent, and for his own benefit, to throw the loss of his speculations on the *bond fide* holders.

*Judgment affirmed.*

### SUCCESSION OF GREMILLON.

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Where a debtor, who had executed a mortgage to secure a debt, subsequently executes a mortgage on other property as a further security for the same debt, the last act reciting that the debt for which the original mortgage was given was still due, that the debtor was unable to pay, and that an extension of time had been granted, but without describing the character or site of the property included in the first mortgage, the inscription of the last mortgage will not be equivalent to a re-inscription of the first, which, if not re-inscribed within ten years from the date of the first inscription, will lose its rank. *Per Cur.* The Code requires the inscription to be renewed in the manner in which it was first made.

The statute of 27 of March, 1835, s. 2, which authorizes married women who have attained the age of twenty-one years, to renounce, by notarial act, with the consent of their husbands, in favor of third persons, their dotal, paraphernal, and other rights, provides that the notary, before receiving the signature of any married woman, shall detail in the act, and verbally explain to her, out of the presence of her husband, the nature of her rights, and of the contract she agrees to; and where such an explanation has not been made to her, the renunciation will be of no effect. A substantial compliance with the proviso is essential to the validity of the renunciation.

Where a husband purchases real estate at a sale of the succession of his wife's father, giving his notes for the price, and receiving a conveyance, and, in the partition of the estate among the heirs, the husband's notes are assigned to the wife as her share, and, after the homologation of the partition, the husband receives the notes from the parish judge, and gives a receipt for them, as his wife's share, and there is no proof that the notes were ever delivered or paid by him to the wife, nor that she had the separate administration of her property, the wife will be entitled to a legal mortgage on all the property of her husband for the reimbursement of the amount of the notes. And in such a case, the reception of the notes, the circumstances of that reception, and their origin being proved, the burden of proving that they were afterwards given, or paid, by the husband, to the wife, is thrown on the party opposing the mortgage.

Decision in *Johnson v. Pilster*, 4 Rob. 71, that the word "same," in art. 2367 C. C. relates not to the proceeds of the paraphernal property sold, as contemplated by the preceding clause, but to the paraphernal property itself, the law intending to secure the wife, in every case, where the husband disposed of her property for his individual benefit, affirmed.

Medical services, rendered after the death of a party to slaves belonging to his succession, are privileged, being for the benefit of the creditors and heirs.

**A** PPEAL from the District Court of Pointe Coupée, *Farrar, J.*

*Cooley*, for the opponent, appellant.

*Lacoste*, contra, contended, 1. That the first mortgage was not legally renewed by the second, the latter not containing any description whatever of the property mentioned in the former, as required by arts. 3273, 3274 C. C. See also *Ells v. Sims*, 2 Annual 251. *Duranton*, page 427, no. 369 to 372 C. C. 3333. *Shepherd v. Orleans Cotton Press*, 2 An. 100. Ibid pp. 520, 768, 799. 2. That, the renunciation, in the act of mortgage of June 29th, 1838, is illegal and null, in this, that it does not appear from the act itself, nor from any evidence *dehors* the act, that the formalities required by the second section of the act of 1835, p. 153, were complied with. 3. That the hereditary portion of *Pauline Joffron* was imputed to the extinguishment of a debt of equal amount due by her husband to the succession of her father, and she is clearly entitled to a mortgage on his

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property, to secure the reimbursement of her paraphernal funds, thus converted to her husband's individual interest. *Rowley v. Rowley*, 19 L. 574. 4 Rob. 71, 114. 5 Id. 347. 6 Id. 154. 7 Id. 88. 2 An. 824, 918. C. C. 2367.

The judgment of the court was pronounced by

SLIDELL J. The principal controversy in this case is between the wife of the deceased, who has renounced the community, and Poydras, the appellant.

The deceased executed a mortgage in favor of Poydras, in 1834, which was recorded in that year. In 1838, another mortgage of additional property was executed for the same debt. This act recited that the deceased was indebted to Poydras in a capital sum of \$6450 95, being the same debt mentioned in the act before the same notary, on the 15th October, 1834, by which a mortgage had been given; and, upon stating the inability of the mortgagor to pay, and that an extension had been granted, he, for additional security, mortgaged other property. His wife intervened in this act, and renounced in favor of the mortgagee. It was recorded in 1838. The act of 1834 was reinscribed in 1845. In 1842, the deceased, as is alleged, became a debtor to his wife for her paraphernal property, received and converted to his own use, and a tacit mortgage was thus acquired in her favor.

The wife contends that the mortgage of 1834 lost its precedence, as against her, by the failure to inscribe it within ten years. Poydras meets this objection by asserting that, the inscription of the act of 1838 was equivalent to a reinscription of the antecedent mortgage, to which its recital referred.

The Code requires that inscriptions must be renewed in the manner in which they were first made. Without attempting to define the precise formalities to be observed under this provision of the law, it is sufficient to say that, the recording of an other act containing a recital so naked as was presented in the present case, is not a compliance with the law. It was entirely silent as to the character or site of the property mortgaged.

The appellant's case is not aided by the wife's renunciation in the act of 1838. The statute of 1835 authorizes married women, who have attained the age of twenty one years, to renounce, by notarial act, with the consent of their husbands, in favor of third persons, their dotal, paraphernal and other rights. But the statute contains the *proviso*, that the notary public, before receiving the signature of any married woman, shall detail in the act, and verbally explain to her, out of the presence of her husband, the nature of her rights and of the contract she agrees to. A substantial compliance with the proviso is essential to the validity of the renunciation. One of its motives was to guard the wife against the influence of the husband, the moral effect of whose presence might control her will, to the prejudice of her interest. This formality was disregarded in the present case, and the renunciation must be held inoperative.

But it is said the wife has not established a right of legal mortgage, within the intendment of the 2367th article of the Code. That it is only where the husband has received the amount of the paraphernal property alienated by his wife, or otherwise disposed of the same for his individual interest, that the law accords a legal mortgage.

Before considering this point, a brief notice of the facts is necessary. *Mrs. Gremillon* was one of the heirs of her father, *Joseph Joffrion*. At a sale of the real estate of her parent, her husband became a purchaser, gave his notes, and received conveyances. When a judicial partition of *Joffrion's* succession was made among his heirs, the husband's notes were assigned to *Mrs. Gremillon* as her share. In 1842, after the partition was homologated, *Gremillon* received

these notes from the parish judge, and gave a receipt for them as his wife's share of the succession. There is no evidence to show that the notes were ever delivered, or paid, to her by her husband, nor that she had the separate administration of her property.

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Article 2367 reads thus: "The wife may alienate her paraphernal property with the authorization of her husband, or, in case of refusal or absence of the husband, with the authorization of the judge; but should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of the husband for the reimbursing of the same."

In *Johnson v. Pilster*, 4 Rob. 71, it was held that the word "same" points, not to the proceeds of the paraphernal property sold, as contemplated in the prior clause, but to the paraphernal property itself; and that the law intended to secure the wife, in every case, where the husband disposed of her property for his individual interest. This interpretation is justified by the reasoning of the court upon the language of the article as a whole; and derives, perhaps, additional force from the broad terms of the french text—*ou en a autrement profité pour son bénéfice particulier*. See also *Compton v. Her Husband*, 6, Rob. 157.

Now, in the present case, the husband has become the owner of real estate belonging to the succession of which his wife was an heir; and the price which fell to her share in the succession went into his hands. So that, in point of fact, he has turned her estate to his individual interest.

The appellant concedes that the case would have come within the Code, if the price for which the husband purchased had been cash, and if the husband had paid it to the succession, and then received it again as his wife's share. Substantially the case is the same, although the husband bought on a credit and gave his notes. The wife's property is gone, and has been converted to the husband's use as much in the one case as in the other. It is proper to observe that the husband's notes took the place of so much real estate of the succession, sold at public sale, and, as we may infer in the absence of contrary evidence, at its fair value. The reception of the notes by the husband being proved, and the circumstances of that reception and of their origin, we think the burden was thrown on the opposing creditor to prove that they were afterwards given or paid by the husband to the wife.

As the wife's mortgage for paraphernal rights absorbs the proceeds of sale of the real estate of *Gremillon's* succession, it is not material to consider her alleged mortgage for dotal claims.

The district judge was satisfied by the evidence, of the justice of *Dr. Mayne's* claim; and we do not consider the decree as requiring amendment on that score. A portion of the medical services were rendered to slaves belonging to the succession, after *Gremillon's* death. These are properly privileged; the disbursement being for the preservation of the estate, and enuring to the benefit of its creditors.

*Judgment affirmed.*

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STANFIELD v. TUCKER, Executor.

Where a debtor transfers to his creditor the notes of a third person, bearing interest at ten per cent a year, for an amount exceeding his debt, to enable the creditor to pay himself,

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and the latter, finding on a settlement with the maker of the notes that he was entitled to credits which reduced the sum due below the amount of the notes, but left a balance exceeding the amount due by the transferrer of the notes, takes new notes from such third person, payable to himself, which are admitted to be good, for the whole balance due by him, bearing interest at ten per cent a year, the debtor will be entitled to recover from his creditor, by whom the new notes were taken, the amount by which the new notes exceeded the sum due to the creditor, supposing so much of the new notes to remain unpaid, with interest at ten per cent a year from their date; but in this case, the principal having adopted the novation, the agent must be allowed, if he choose, to give the unpaid new notes in payment *pro tanto*. *Aliter* in case the whole amount of the new notes had been collected, in which case the agent would be liable only for interest at five per cent a year on any balance due to the principal, from the time when it was actually collected. The mandate of the creditor was to collect the debt due by such third person, to pay himself out of the proceeds, and to account to his principal for the surplus. He violated the mandate by taking the new notes, and thus novating the debt. In consequence of this violation, the principal could either consider his creditor as having made the debt of such third person his own, and claim the surplus from him at once; or, he might adopt the transaction, and treat the notes as acquired for his benefit; and where there is nothing to show that the principal has done any act to deprive himself of the choice, the institution of an action against his debtor to recover the balance due him with interest at ten per cent a year from the date of the new notes, will be considered as an adoption of the novation. Art. 2984 C. C., which declares that "the attorney is answerable for the interest of any sum of money he has employed for his own use, from the time he has so employed it, and for that of any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over," making the agent responsible only for legal interest, must be construed in connection with other principles of the law of agency, which declare that profits made by the agent, whether in the ordinary course of the business of the principal, or by a violation of his duty as agent, should belong to the principal. C. C. 2974. [*Eustis*, C. J. and *Rost*, J., dissenting.]

Art. 2984 C. C. was enacted in the interest of the principal, and not to shield the unfaithful agent; and should be so construed as not to conflict with other rules adopted by the law in favor of the principal, and to secure strict good faith in the agent. [*Eustis*, C. J. and *Rost*, J., dissenting.]

**A**PPEAL from the District Court of Lafourche Interior, *Burke*, J.  
*S. L. Johnson*, for the appellant, *J. C. Beatty*, for the defendant.

The court being equally divided, the judgment of the lower court, under art. 68 of the constitution, is affirmed.

**SLIDELL**, J. *Stanfield* owed *Robinson* \$10,000. To enable *Robinson* to pay himself, *Stanfield* transferred to him notes of *C. Aubert*, bearing ten per cent interest, amounting to about \$17,000. On a settlement between *Robinson* and *Aubert*, it was found that *Aubert* was entitled to credits which reduced *Stanfield's* claim to \$13,657 12, for which amount *Aubert* gave *Robinson* new notes, payable to *Robinson's* order, and bearing ten per cent interest from the date of the settlement, 1st April, 1842, until paid. A portion of these notes has been paid; some are yet unpaid, but are all considered good. The defendant admits that plaintiff is entitled to \$3657 12; but contends that *Robinson's* estate can only be held to pay five per cent interest, from 1st April, 1842. The plaintiff asserts a right to ten per cent interest.

Under the assignment, it was the duty of *Robinson* to collect the debt due by *Aubert*, apply the fund to the payment of his own claim, and account to *Stanfield* for the surplus. *Robinson* was, therefore, a trustee for *Stanfield*. As such trustee, he stood towards him in the relation of agent to principal; and not the less so because his authority was coupled with an interest. *Stanfield* could not revoke the authority, without paying *Robinson*; but, on the other hand, the latter could do no act inconsistent with the mandate which he had accepted,

and the trust with which the fund was clothed. Keeping in view these relations of trustee and agent, the solution of the controversy is free from difficulty.

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*Robinson's* mandate was to collect the debt from *Aubert*. He violated this mandate by taking the new notes of *Aubert*, and thus novating the debt. The right of *Stanfield*, by reason of this violation, was two fold: He could either consider *Robinson* as having made the *Aubert* debt his own, and claim the surplus at once from him; or, if he chose, adopt the transaction, and, treat the new notes as acquired for his benefit. There is nothing to show that *Stanfield*, or his representatives, did any act to deprive them of this choice. The present action, in my opinion, adopts the novation, and claims the benefit of it. I think, he is clearly entitled to it; for it is a benefit made from his own property.

It is true that our Code contains a provision that: "The attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has employed it; and for that of any sum remaining in his hands, from the day he becomes a defaulter, by delaying to pay it over." If the rights of the party are to be controlled exclusively by this article of the Code, it might be beyond our power to allow any thing more than five per cent interest, the legal interest there contemplated. But this article of the Code must be construed in connection with other principles of the law of agency. It was undoubtedly enacted in the interest of the principal, not to shield the unfaithful agent; and should not, therefore, conflict with other rules, adopted by the law in favor of the principal, and for the purpose of securing that strict good faith, which is exacted from him who stands in a situation of confidence with regard to another.

It is a familiar principle of the law of agency that, profits which are made by the agent, in the course of the business of the principal, belong to the latter. When the profits, says Mr. Story, are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct; and when the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit. Treatise on Agency, § 207. In the same spirit our Code speaks: "He is bound to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly." C. C. 2974.

It is true that cases might occur, where it would be impossible to ascertain and identify the profits made by the agent, by the use of his principal's money or other breach of duty; and, from the necessity of the case, the court would then be restricted to the mere allowance of interest. But where there has been such an appropriation of the trust property that it can be clearly and unequivocally identified, the change which it has undergone in point of form should not be permitted to frustrate the just pursuit of the principal, and put a profit into the pocket of the agent or trustee, at his expense. *Bonæ fidei hoc congruit, ne de alieno lucrum sentiat.*

But for what time are we to allow the ten per cent interest? The debt due by *Aubert* is the trust fund, which *Robinson* has had under his administration for the purposes contemplated in the agreement of the parties. This debt bore ten per cent interest. No part of it was paid before 1845, and a part is still unpaid. Ten per cent has been collected on what was paid; and will be collected on the residue, for the debt is admitted to be good. *Robinson* had a right to pay himself first, to the amount of \$10,000; and as the defendant has not thought proper to furnish an account, it does not appear that there was, at the date of the suit, enough realized to leave a surplus after paying *Robinson's* claim. It was part of the agent's duty to render this account, and he must take the conse-

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quences of his silence. As a portion of the *Aubert* notes is still unpaid, and their amount is not shown, we will consider that amount as equivalent to the plaintiff's interest in the fund; and as that fund will be collected, with ten per cent interest from 1842, it is right that the plaintiff should have interest from that date. If it had appeared that the entire fund had been collected by the trustee, before he was put in default, I should probably have allowed ten per cent interest down to the time at which it was actually collected from *Aubert*, and not more than five per cent thereafter.

As the plaintiff adopts the novation, the defendant must have the privilege of giving the unpaid notes of *Aubert* in payment, *pro tanto*, if he thinks proper to do so.

KING, J. I concur in the foregoing opinion read by Mr. Justice Slidell, and adopt the reasons which he has assigned.

ROST, J. It is stated in the opinion delivered by Mr. Justice Slidell, that *Robinson's* mandate was, to collect the debt from *Aubert*; and that he violated this mandate, by taking the new notes of *Aubert* and others, and novating the debt. That the right of *Stanfield*, by reason of this violation, was two fold: he could either consider *Robinson* as having made the *Aubert* debt his own, and claim the surplus at once from him; or, if he chose, adopt the transaction, and treat the new notes as acquired for his benefit; that there is nothing to show that *Stanfield*, or his representatives, ever did any act to deprive them of this choice; and that the present action expressly adopts the novation, and claims the benefit of it.

I concede all this, except that the plaintiff is now claiming the benefit of the novation.

The benefit of a novation, is the immediate liability for the debt, with legal interest.

I admit that it is a familiar principle of the law of agency that, profits which are made by the agent in the execution of the mandate belong to the principal. But the profits claimed were made in violation of the mandate, not in execution of it, and the responsibility of *Robinson* is to be tested by other rules. After an express denial that *Robinson* acted as agent in novating the debt, he cannot be held responsible in that capacity.

I am of opinion that the judgment should be reversed, and judgment entered in favor of the plaintiff for the sum claimed, with interest at the rate of five per cent only.

EUSTIS, C. J. I concur in the foregoing opinion read by Mr. Justice Rost, and adopt the reasons which he has assigned. *Judgment affirmed.\**

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#### GRIDLEY et al. v. CONNER.

A party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding.

One who opposed the seizure of slaves under a judgment, on the ground that they belonged to him, and whose title was, on the trial of the opposition, adjudged to be simulated and fraudulent, having purchased, pending the opposition, a judgment against his pretended vendor, opposed a subsequent seizure of the same slaves under the judgment under which they were first seized, claiming to be paid out of the proceeds of their sale in preference to the plaintiffs. *Held*: That he must be concluded by his previous claim to the ownership of the slaves on which he now pretends to hold a mortgage. If his claim

\* The judgment below allowed interest at ten per cent a year on the balance due to the plaintiff on the new notes from their date, charging her with the expense of their collection by suit.

to the ownership were true, the judicial mortgage would have been extinguished by confusion. C. C. 3374.

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**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* In this case, on motion of the counsel for *Barrow*, it was ordered that the sheriff retain in his hands the proceeds of the sale of certain slaves made under execution, until the further order of court; and that the plaintiffs show cause why said *Barrow*, as assignee of *Tulane*, should not be paid, in preference to the plaintiffs, the balance due on the judgment against *Conner* in favor of *Tulane*, and assigned by the latter. The court below discharged the rule.

*Roselius*, for the plaintiffs. *L. Janin* and *M. Taylor*, for the appellant, *Barrow*. The judges being equally divided in opinion, the judgment of the lower court is affirmed, under art. 68 of the constitution.

**EUSTIS, C. J.** The plaintiffs seized certain slaves as the property of the defendant, under an execution. *Robert R. Barrow* filed a third opposition, claiming to be paid out of the proceeds of the slaves in preference to the plaintiffs, by virtue of a judgment in favor of *Paul Tulane* against the defendant, of which he, the said *Barrow*, alleges himself to be the owner. *Barrow* had, on a previous occasion, made an opposition to a seizure made under the same judgment by the plaintiffs of the same slaves, on the ground that they belonged to him; and this court held his title to them to be simulated, fraudulent and void. The district court decided against the claim of *Barrow*, and he has appealed.

The appellant, according to his statement of the case, became the owner of the *Tulane* judgment, on the 31st March, 1848. The first opposition, founded on his pretended title, was then pending in the district court, and was not adjudicated upon until May following.

There have been presented several objections to the right of the appellant to avail himself of this judgment adversely to the plaintiffs; the most material is, that he is *estopped* by his previously asserted claim to the ownership of the slaves, on whom he now pretends to hold a mortgage. It is clear that, if his claim to the ownership were true, the judicial mortgage as to the slaves would be extinguished by confusion, for a man cannot hold a mortgage on his own property. Civil Code, 3374. We understand it to be a rule in the administration of justice, that a man shall not be permitted to deny what he has solemnly acknowledged in a judicial proceeding, nor to shift his position at will to a contradictory one, in relation to the subject matter of litigation, in order to prostrate and defeat the action of the law upon it. *Sprigg v. Bank of Mount Pleasant*, 10 Peters, 257. *Jackson v. Stevens*, 16 Johnson R. 110. *Jackson v. Murray*, Id. 201. *Welland Canal Company v. Hathaway*, 3 Wendell, 480. *Freeman v. Savage et al.* 2 Annual, 269.

**ROST, J.** I concur in the opinion delivered by the chief justice, and adopt the reasons upon which it rests.

**SLIDELL, J.** The previous opposition of the appellant, in which he claimed the property as the owner, was made on the 8th June, 1847. He did not acquire, until March, 1848 the judgment, from the recording of which the general mortgage resulted which he seeks to enforce. I know of no rule of law which compelled him upon acquiring this new and distinct right to set it up at once, in a suit in which he was litigating the question of ownership. Indeed it seems questionable whether he would have been permitted to amend his first opposition, by setting up the newly acquired right. The objection would have been raised that it altered the substance of the demand.

I do not perceive how the *mala fides* of *Barrow*, in becoming the simulated



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vendee of *Conner*, can affect, to his detriment, his subsequently acquired rights as transferee of the mortgage right of *Tulane*. That *Tulane* was a *bona fide* judgment creditor of *Conner* is not disputed. *Tulane* certainly could maintain this opposition. There is no evidence to impeach the good faith of *Barrow*, so far as the transfer from *Tulane* is concerned. Why then has not *Barrow* the same mortgage lien upon the property which his author, *Tulane*, had? The good faith of the transferor inures to the transferee.

It is very true that a man cannot be at the same moment the mortgagee and the owner of land. But it does not follow that the assertion of one right estops the subsequent assertion of the other. A, brings against me a petitory action for a tract of land, and prays my eviction. I defend, alleging title. A succeeds, and evicts me. I then attack A, upon a judgment recorded against him prior to the institution of his petitory action. Am I estopped because I did not set up my mortgage in the former suit, when the title was at issue? Clearly not. There is no *res judicata*, and no estoppel.

Reverse this case, and suppose that, in June, 1847, *Barrow* had filed an opposition alleging himself to be the owner of a judicial mortgage upon the property, and as such entitled to preference over the plaintiff in execution. Suppose that, in 1848, during the pendency of this opposition, he discovers that *Tulane* held a title as owner paramount to *Conner's* title, and purchased this title from *Tulane*. *Barrow* goes to trial on his first opposition, and is defeated on the ground that his judgment against *Conner* was fraudulently obtained, upon a pretended claim having no existence. Is *Barrow* estopped from afterwards setting up his title as owner derived from *Tulane*? I cannot think so.

KING, J. I concur in the opinion read by Mr. Justice Slidell, and adopt the reasons which he has assigned.

*Judgment affirmed.*

### MCMASTERS v. MATHER.

An action against the maker of a promissory note will be prescribed by five years from its maturity, though the maker reside during that time in another State, where the holder was aware of the place of his residence.

An endorsement of a partial payment made on a promissory note, where there was no evidence to show in whose writing it was, nor when it was made, will not interrupt prescription.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. This was an action on a note dated and payable in New Orleans. *Van Dalsen*, for the appellant. *Prentiss* and *Finney*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. We think the plea of prescription was properly maintained. See *Hatch v. Gilmore*, 3 An., 508. *Duncan v. Ford*. *Tyson v. McGill*, 15 La. 145. The case of *Boyle v. Mann*, ante p. 170, is not in point. There the evidence was considered as authorizing the inference of a dishonest purpose, and that the debtor had departed from the United States with the avowed purpose of baffling his creditors. Besides, *Mather* appears to have lived in Mississippi from the date of the note to a period of five years subsequent to its maturity, and the plaintiff was aware of his residence.

We are also of opinion that the district judge did not err in refusing to consider the note as relieved from prescription, by the endorsement which appeared on it.

It matured in 1841, and on the back was written: "Received on the within from J. E. Morehouse, eighty-one dollars in gold, December 11th, 1843." This suit was brought in March, 1848. There was no evidence to show in whose hand writing the endorsement was, nor when it was put there. The case is fully covered by that of *Roseboom v. Billington*, 17 Johnson, 181.

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*Judgment affirmed.*

### WARNOCK v. CITY OF LAFAYETTE.

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The power of removing certain municipal officers for negligence or malfeasance, and of declaring their offices vacant and ordering a new election, conferred upon the City Council of Lafayette by sec. 11 of the stat. of 29 April, 1846, to be exercised "by a vote of two thirds of that body," must be construed as meaning two thirds of that body as legally constituted by the presence of a quorum, and not two thirds of the whole number of members composing the council.

**A** PPEAL from the District Court of Jefferson, *Clarke, J. Elliott and Marks*, for the appellant. *Brewer*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. The petition alleges that the plaintiff was duly elected, on the 3d of May, 1847, harbor master for the city of Lafayette, for the term of one year, and that he discharged the duties of the office until the 29th of November, 1847, when he was suspended from office by the mayor and city council of said city; and that, on the 15th day of December, his said office was declared vacant; that, at a new election ordered by said mayor and city council, *D. Adams* was elected to said office, and has performed the duties since the 30th of December, 1847.

The petition charges that the proceedings of the city council were without any of the formalities of law, and in violation of the acts of the legislature under which the said mayor and council held their authority; that his suspension and removal from office were entirely unwarranted, the vote by which he was removed from office having been by a less number of members than that required by law for the removal of officers of the corporation; that there never was a proper notification made of the charges against the plaintiff, nor an opportunity to defend himself afforded to him; that he had always faithfully and honestly discharged the duties of his office, and accounted to the proper officers for the money received by him by virtue of his office aforesaid. The object of this suit is to recover from the defendants, who are the mayor, aldermen, and inhabitants of the city of Lafayette, the fees and emoluments of the office accruing during the year for which he was elected.

The defence is that, the plaintiff was suspended from office, and the office declared vacant, by the city council of Lafayette, in consequence of the plaintiff's malfeasance in office, he having been a defaulter and applied the monies received by him to his own use. The district judge gave judgment in favor of the defendants, and the plaintiff has appealed.

By the act of the 29th of April, 1846, entitled an act to reincorporate the city of Lafayette, the harbor master and certain other officers of the corporation are to be elected annually by the qualified voters of said city. By the 11th section of said act, the city council is empowered to decide upon the election and qualification of their own members, and of the officers elected under the act; and,

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in case of gross negligence or malfeasance in office of any officer thus elected, on charges preferred and satisfactorily established, the said city council has the right, by a vote of two thirds of their own body, to declare such office vacant, and to order a new election.

We are satisfied, from the evidence, that the city council, in suspending the plaintiff, and removing him from office by declaring the office vacant, were not only justified in so doing, but could not have acted otherwise, consistently with their duties to their constituency, and that their proceedings on the charges made were legal and proper. The only objection among those made by the plaintiff to the validity of their proceedings, which we think it material to notice, is that which relates to the number of votes by which the vacancy of the office was declared.

The council is composed of ten members. At the session in question nine members only were present. The votes on the resolution by which the office was declared vacant were, six in favor of, and three against it; thus, two thirds of those present voting to create the vacancy, but not two thirds of the whole number of members constituting the council. By the 11th section, before quoted, the vote required to create a vacancy is two thirds of their own body, which, it is insisted, means two thirds of all the members composing that body. In aid of this construction the counsel for the plaintiff refers to the debates of the late convention which formed the constitution, p. 675. We should infer from those debates that, the terms "*their own body*" did not refer necessarily to the whole number of members elected. The debate was upon the removal of the judges by address of three fourths of *each house of the general assembly*. The terms are not the same, and the argument is merely one of analogy. We should rather incline to the opinion that the vote required to remove was, two thirds of the body as legally constituted by the presence of a quorum. We observe the terms used on similar occasions, in our constitution and our legislation are much more definite, requiring a proportion of the members elected, or of the members present, as the case may be. If the meaning of the terms be doubtful, the french text removes every doubt as to the purpose and intention of the legislature. *Breedlove v. Turner*, 9 Martin, 353. The corresponding words in french are: "*Le conseil aura le droit,*" &c.; and the 16th section of the act provides that the mayor, or, in his absence or inability to act, the president, and a majority of the members elect of said council, shall form a quorum to do business. The vote of the six members was, therefore, sufficient to create the vacancy.

*Judgment affirmed.*

### SUCCESSION OF MONTGOMERY.

Where slaves and other property were conveyed, in another State, by a deed of trust for the benefit of a creditor, and a part only of the property conveyed is accounted for, and the creditor is proved to have in his possession some of the slaves so conveyed, besides having received various sums under the same title, no portion of his claim can be allowed.

**A**PPEAL from the District Court of Madison, *Selby, J. v. R. C. Downes, Stacy and Sparrow*, for the appellant. *Stockton and Steele*, for the opponents. The judgment of the court was pronounced by

ROST, J. This case was before us on a former appeal, and the facts of it are

fully stated in the opinion then delivered. 2d Annual, 469. It was remanded for the purpose of correcting the numerous irregularities in the record, with instructions to the court below to require a new account and tableau to be filed by the curator of *Montgomery's* succession. A new tableau has accordingly been filed, and the opponents on the first tableau have renewed their oppositions. The judgment of the district court sustains them, so far as they resisted the privilege claimed by *W. Jenkins* for himself and *J. Jenkins*, except for the amount of \$1508 75, which the court ordered to be paid by privilege under the deed of trust mentioned in the former opinion of the court. The judgment then distributes the remainder of the fund among the ordinary creditors. The curator has appealed, and the opponents ask that the judgment be amended in their favor.

We are of opinion that there is error in the judgment, so far as it allows a privilege to *William Jenkins* and the estate of *James Jenkins*, under the deed of trust, for any portion of their claim. The deceased assigned to *Whittington*, for their benefit, thirty eight slaves, horses, cattle and moveables; of all this property only twenty four slaves are accounted for, and it is shown that *William Jenkins* has in his possession some of those slaves and cattle, in addition to various sums of money received by him under the same title. Claiming equity under the deed of trust, these parties must do equity, and as they have failed to account for the remainder of the property assigned for their benefit, they cannot be heard.

The other questions in the cause are exclusively questions of fact, and appear to have been correctly decided in the court below.

The judgment is therefore reversed, and it is ordered that the tableau filed in this case be amended so as to distribute the sum of \$5,937 13, now in the hands of the curator, among the creditors of the succession, and in proportion to the amount of their respective claims. It is further ordered that the costs of this appeal be paid by the appellant; the costs of the district court to be paid by the curator.

### PURVIS et al. v. HARMANSON et al.

The *dictum* in *Jewell v. Porche*, 2 An. 148, that whatever be the name inserted in the certificate of the board of commissioners of the United States confirming a spanish grant, the confirmation must inure to the benefit of the real owner," was said *arguendo*, and cannot be considered as a precedent. The question was not at issue in that case.

Decision in *Pontalba v. Copland*, 3 An. 56, that the Supreme Court of this State must conform its decisions to those of the Supreme Court of the United States; on questions involving the alienation of the public domain, and the interpretation of treaties and acts of Congress, affirmed.

Confirmations of claims by boards of commissioners of the United States organized for the adjusting of land titles, confirmed by Congress, in favor of persons claiming by derivative titles, inure to their own use. It would defeat the whole object of the laws creating such boards, and introduce infinite public mischief, to hold that the commissioners were to act only on original claims, and, by confirming the right of the original owner, place the derivative title under him entirely open between adverse claimants.

No title passed from the crown for lands in the spanish province of Louisiana, by the execution of an order to survey and put the applicant in possession. The applicant became the owner of the land only after the real title, completed with all the formalities prescribed by the spanish regulations, was delivered to him.

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APPEAL from the District Court of West Feliciana, *Stirling, J. Ralliff* and *Covgill*, for the plaintiffs. *Hudson and Patterson*, for the appellant. The judgment of the court was pronounced by

ROST, J. This is a petitory action, for land situated in that portion of the State which was not taken possession of by the United States till some years after the delivery of the colony of Louisiana, under the treaty of cession. The title of the plaintiffs consists: 1st. of a petition presented by *Juan Say* to *Grandpré*, whom he styles governor of Florida, praying for an order of survey, in order that the petitioner may present himself to the competent authority to obtain the grant; 2d, of the order of survey made thereon by *Grandpré*, on the 24th May, 1806; 3d, of a survey made in conformity with that order; 4th, of a transfer, by authentic act, from *Juan Say* to the plaintiffs, bearing date the 15th May, 1817; 5th, of a certificate of confirmation of the land in favor of *John Maulden*, original claimant *Juan Say*, under the act of congress of the 8th May, 1822; 6th, of an order of survey, directing the land to be surveyed in strict conformity to the original survey, made in 1806. The defendants' title is based upon a donation claim in favor of *James C. Williams*, confirmed by the same act of congress. The judgment of the court\* below was in favor of the plaintiffs, and the defendants appealed.

The appellants contend that the confirmation to *John Maulden* operated to his own use; and that, as the appellees do not pretend to derive title from him, they cannot recover. They rely for this ground of error on several decisions of the Supreme Court of the United States. It is argued by their adversaries that, the confirmation of the United States government is only a relinquishment of the title in the government, and leaves it as to individuals as it existed before; and that in all cases where a regular chain of title is not produced, the title inures to the benefit of the original claimant. Several decisions of our predecessors sustain the position assumed by the appellees. *Bradley's heirs v. Calvit*, 5 M. 662. *Sanchez v. Gonzales*, 11 M. 287. *Sackett v. Hooper*, 3 La. 107.

In the case of *Jewell v. Porche*, 2 An. 148, we referred to those decisions, and stated that, whatever be the name inserted in the certificate, the confirmation must inure to the benefit of the real owner. That question was not at issue in that case, nor was it necessary to decide it; what we said *arguendo* cannot be considered as a precedent.

In the case of *Pontalba et al. v. Copland et al.*, 3 An. 86, the same question came before us in another shape; and, after solemn argument, we came to the conclusion that we could not differ from the Supreme Court of the United States on questions involving the alienation of the public domain, and the interpretation of treaties and acts of congress.

In the case of *Strother*, the Supreme Court of the United States held the following: "There remains but one other point, on which the court gave their opinion in a former case which was then made by the plaintiff's counsel in their argument, and has been strongly urged in this case, that the confirmation of the commissioners inured to the plaintiff's use. The reasons assigned for this position are, that the only object of the acts of congress being to ascertain what property had been acquired by individuals before the cession, the commissioners were to act only on original claims, and, by confirming the right of the original owner, to leave the derivative right under him entirely open between adverse claimants. The court were before of opinion that this view of the case could not

\* The judgment was rendered in accordance with the verdict of a jury.

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be sustained; and we are now of opinion that it is inconsistent with all the acts of congress which have organized boards of commissioners for adjusting land titles, the proceedings of the board, and the laws which have confirmed them. It would defeat the whole object of these laws, and introduce infinite public mischief, were we to decide that the confirmations by the commissioners and congress, made expressly to those who claim by derivative title, did not operate to their own use." *Strother v. Lucas*, 12 Peters, 458.

This doctrine is reiterated and affirmed in the cases of *Grignon, lessee v. Astor et al*, 2 Howard, 344, and of *Chouteau v. Eckhart*, p. 374 of the same volume. In the case of *Marie Nicolle Les Bois v. Samuel Bramel*, 4th Howard, 449, the whole subject was reviewed with great care, and we cannot do better than extract that portion of the opinion of the Supreme Court which refers to it:

"It is insisted that the plaintiff had a vested interest to the land confirmed when the United States acquired Louisiana, which is protected by treaty stipulation, and that such right no act of Congress could defeat; that, by the third article of the treaty of 1803 with France, the inhabitants of the ceded territory were to be incorporated into the Union, to be admitted to the rights, advantages, and immunities of citizens of the United States, and, in the meantime, they were to be maintained and protected in the free enjoyment of their liberty, property and religion; and this implied that, after their admission, they should be equally protected; and that such would have been the measure of justice applicable to their rights of property by the laws of nations, had the treaty been silent on the subject. On this assumption the plaintiff mainly relies. That it is true in the abstract, is not doubted; but it involves several opposing considerations applicable to her title: 1. Whether such a vested property in the soil existed in *Les Bois*, before the date of the treaty, as bound the government of Spain to perfect, by the execution of a complete title, the first insipient step. 2. Whether the judicial power has any jurisdiction to interfere and enforce such right, supposing it to exist.

"That this government had imposed on it the same duty to perfect the title that rested on Spain before the country was ceded, is not open to question; but this was all the United States were bound to perform. How then, did the plaintiff's claim stand previous to the cession? Her first decree and order of survey bear date in May, 1802, and the survey was made in August, 1803; but there is no evidence that any part of the land was either occupied or cultivated. The lieutenant governor's decree is in the usual style, and concludes, "*that it is given to serve the interested parties to obtain the concession and title in form from the intendant general, to whom alone corresponds, by royal order, the distributing and granting of all classes of the royal domain.*"

"On the 22d of October, 1798, the king of Spain appointed *Morales* intendant general and subdelegate; he kept his office at New Orleans, and he was charged with the superintendence and granting of the public domain in the provinces of upper and lower Louisiana, to the conclusion of all other authority.

On July 17th, 1799, *Morales* published his regulations to the inferior officers and the people of the provinces, so that (in his own language) *all persons who wished to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted and sold; that those who are in possession without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants and subdelegates of the intendency may be informed of what they ought to observe.* 2 White's Recopilacion, 234.

By art. 18, it is declared: Experience proves that, a great number of those

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who have asked for land think themselves the legal owners of it; those who have obtained the first decree, by which the surveyor is ordered to measure and put them in possession; others after a survey has been made, have neglected to ask the title for the property; and as like abuses, continuing for a longer time, will augment the confusion and disorder which will necessarily result, we declare that no one of those who have obtained said decrees, notwithstanding in virtue of them the survey has taken place, and that they have been put in possession, can be regarded as owners of land until their real titles are delivered, completed with all the formalities before recited.

"The formalities recited are found in the three preceeding sections, which give precise instructions how the title is to be made out, and where it is to be recorded.

"The whole matter of perfecting the title was referred to the intendant general, and he, and those acting subordinate to him in this respect, were undoubtedly governed by the intendant's regulations. As the king's representative and deputy, he was to judge whether the considerations moving the lieutenant governor were such as warranted the grant; next, whether the conditions had been performed.

"The granting power was in a great degree political, and altogether the exercise of royal authority; and, of course, subject to no supervision, but by the same high authority itself. By the treaty, the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity; nor could the courts of justice be permitted to interfere; if they could, and by their decrees complete the title, all power over the subject might have been defeated, not by courts of the Union only, but by the State courts also."

These decisions are conclusive, and we have acted upon them in the case of *Lobdell v. Clark*, ante p. 99.

Admitting, for the sake of argument, that the inchoate grant of the plaintiffs was a valid order of survey, the title to the land did not pass under it: it passed by the conformation alone, and, as was held in *Strother's* case, the party in whose name it was made must be considered as the grantee.

The plaintiffs have not made out in themselves such a title as entitles them to recover.

It is therefore ordered, that the judgment in this case be reversed, and that there be judgment in favor of the defendants, with costs in both courts.

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### EX PARTE EMANUEL et al.

A suspensive appeal will not lie from an order discharging a prisoner under a *habeas corpus*, although the imprisonment grew out of proceedings in a civil action.

[*King, J. and Slidell, J. dissenting.*]

**R**ULE on *Buchanan*, Judge of the Fifth District Court of New Orleans, to show cause why a *mandamus* should not be issued, commanding him to allow a suspensive appeal from an order discharging, on a *habeas corpus*, an insolvent debtor, imprisoned under an order made in the course of proceedings instituted against him by his creditors. The judge rejected the application for a suspensive appeal, saying: "I consider it my duty to refuse a suspensive appeal from a judgment discharging a petitioner on a writ of *habeas corpus*. The Code of Practice, art. 824, says that the petitioner shall be immediately discharged. I

have no objection to allow a devolutive appeal, although the decisions of the Supreme Court are contradictory ; and the jurisprudence, as settled by the present bench, seems to be adverse to the allowing of any appeal."

*Benjamin and Micou*, for the appellants, cited *Lavery v. Duplessis*, 3 Mart. 42. *Dodge's case*, 6 Ib. 570. *Martin v. Ashcroft*, 8 Ib. N. S. 314. *Chardon v. Guimblotte*, 1 La. 423. *Hyde v. Jenkins*, 6 La. 436. *State v. Judge of Commercial Court*, 5 La. 194. *Ex parte Lafonta*, 2 Rob. 496. *Ex parte Mitchell*, 1 Ann. 413. *Succession of Macarty*, 2 Ann. 979. Const. of 1812, art. 4, sec. 3. Const. of 1845, art. 63, 67. Const. U. S., art. 3, sec. 2. *Cohen v. Virginia*, 6 Wheaton, 392.

*Schmidt and Roselius*, contra.

The court being equally divided, the judgment below was, under article 68 of the constitution, affirmed.

EUSTIS, C. J. and ROST, J. For the reasons given by the district judge, we are of opinion that the judgment of the court below should be affirmed.

SLIDELL, J. *Charles Patterson* filed, in the Fifth District Court of New Orleans, his petition as an insolvent debtor. *Emanuel* and others, his creditors, made a charge of fraud, and obtained an order of arrest. The terms of the writ, which followed the order, were that the sheriff should arrest the body of *Patterson*, and him confine till he shall give bond, with good and sufficient security, in the sum of \$20,000, conditioned that he will not leave the limits of the jurisdiction of this court, until after the surrender of his property shall have been accepted by his creditors, or duly homologated, and the property surrendered by him duly delivered. *Patterson*, being unable to give bail, remained in custody. Subsequently a meeting of his creditors took place, and their proceedings were homologated. *Patterson* then presented a petition for a writ of *habeas corpus*, praying for his discharge, on two grounds. *First*, That his arrest was illegal, there being no law to authorize the same. *Secondly*, Because the term of his imprisonment had expired, and the conditions upon which it was to continue had been fully accomplished, because the property by him surrendered had been delivered to his creditors, they had accepted the surrender, and their proceedings had been homologated. Notice of this application was given to the creditors ; and, after a hearing, the district judge rendered the following judgment : The court having taken this case under consideration, considering that the period fixed by the order of Judge *McHenry*, acting as judge of this court, on the 24th ult., for the imprisonment of the petitioner, has, by the terms thereof, and by the terms of art. 233 of the Code of Practice, expired, it is decreed that the petitioner, *Charles Patterson*, be discharged from custody forthwith. The creditors, whose charge of fraud was still untried, then prayed for a suspensive appeal from the order of discharge, which the court refused ; whereupon they applied to this court for a *mandamus*, to compel the district judge to grant them such appeal. A rule to show cause having been granted, the district judge answered as follows :

"The defendant comes into court, and, with respect, shows, in answer to the rule nisi for a *mandamus* served upon him in this case ; that this respondent considered it to be his duty, under the provisions of article 824 of the Code of Practice, to refuse a suspensive appeal from the judgment rendered in the matter of *Charles Patterson*, praying for the writ of *habeas corpus* : That the writ of *habeas corpus* is issued to a person who detains another in custody, commanding him to bring before the court issuing the writ the body of his prisoner, together with the cause of his detention ; and if, upon examination of the case, on the return of the writ, the court issuing the same be of opinion that the imprison-

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ment cannot legally continue, the prisoner is to be *immediately* set at liberty. The only issue is, the right of the petitioner to his liberty; and the judgment is carried into effect without delay, either by discharging the prisoner, or by remanding him to prison. Such is respondent's view of our *habeas corpus* act, and such has been the uniform practice, for many years, of the court over which he presides. In the present case, the application of *Patterson* for a *habeas corpus*, was notified to the party who had procured his arrest, according to the requirement of article 821 of the Code of Practice. And that party, the relator in the present case, was present in court upon the trial of the *habeas corpus*, both personally and by counsel. His counsel was heard in opposition to the discharge of *Patterson*, and the judgment was pronounced in his presence. And this respondent hereto annexes as part of this answer, the record of the case of *Charles Patterson v. His Creditors*, and that of *Charles Patterson*, praying for the writ of *habeas corpus*; and submits himself to the judgment of the court in the premises."

Some remarks have been made in argument as to the correctness of the opinion and judgment by which *Patterson* was set at liberty. This is a subject which is not now before us. Our inquiry is, not whether the judgment is erroneous, but whether the creditors had a right to a suspensive appeal from the judgment. The right of appeal is not dependent upon the correctness or error of the judgment. Until the judgment is before us by appeal, we cannot pronounce it right or wrong.

The question is one of the appellate power and jurisdiction of this court; and for its solution our first resort must be to the constitution, under which this court has its being.

The 63d article of the constitution decrees that the Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only; which jurisdiction shall extend to all cases where the matter in dispute shall exceed \$300, and to all cases in which the constitutionality or legality of any tax, toll or impost, of any kind or nature soever, shall be in contestation, whatever may be the amount thereof; and likewise to all fines, forfeitures and penalties imposed by municipal corporations; and, in criminal cases, on questions of law alone, whenever the punishment of death, or hard labor, may be inflicted, or when a fine exceeding three hundred dollars is actually imposed." Art. 67 declares that the Supreme Court, and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of all persons in actual custody under process, in all cases in which they may have appellate jurisdiction.

We will first inquire into the appellate jurisdiction of the court in this case, as controlled by the 63d article, and as though that article stood alone; reserving, for subsequent consideration, the effect of the 67th article upon the grant of jurisdiction antecedently made.

And here the first consideration which presents itself is, the identity of the appellate jurisdiction of this court in civil cases with that of our predecessors under the former constitution adopted in 1812, and under which the State was governed for more than thirty years. The second section of the 4th article of that constitution ordained, that: "The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases where the matter in dispute shall exceed the sum of three hundred dollars." It is true that, in the present constitution, the word "civil" is not expressly used; the language of the first clause of the 63d article being, "all cases where the matter in dispute shall exceed

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three hundred dollars;" but its insertion would have been surplusage. That civil cases, and none others, were contemplated in that clause, is obvious from the subsequent provision with regard to the appellate jurisdiction in criminal cases; a jurisdiction of a restricted character, and, unlike that conferred in civil cases, limited to "questions of law alone."

In copying the constitution of 1812, we are bound, as we said in *McKee v. Ellis*, 2 Ann. 167, to presume that the convention was aware of the construction which the same grant of jurisdiction had received from the Supreme Court, and intended that, in the new constitution, it should have the same meaning. *Si de interpretatione legis queratur in primis inspicendum est quo jure civitas retro in ejusmodi casibus usa fuisset.* What was held, therefore, by our predecessors upon the present question has the authority of precedent; and the force of that authority is certainly much increased, if it be found upon the examination of their decisions, that they are uniform and repeated. See *Succession of Macarty*, 2 An. 979.

We will proceed therefore to a brief review of the jurisprudence on this subject, as an indispensable duty in the solution of the present question.

The first case to which our attention has been called is *Laverty v. Duplessis*, decided in 1813. That was an application for a *mandamus* to the district court, to allow an appeal from an order on a *habeas corpus*, discharging *Laverty*. He had been arrested by the marshal of the United States, as an alien enemy, under an order to remove such persons to the interior of the country, the United States being then at war with Great Britain. The court refused the *mandamus*. But it is obvious, from the tenor of the opinion, and from the construction which the case subsequently received, that the refusal was based upon the ground, that the court had, under the constitution, no criminal appellate jurisdiction, and that the matter involved was one of a criminal nature. See 3 Mart. Reports, 42. The court commences its opinion by declaring that, the case presents two questions for its consideration: 1st. Whether any, and what, criminal appellate jurisdiction is given; and 2dly, whether, under the constitution or laws, the Supreme Court could exercise a general superintending jurisdiction over inferior courts.

*Dodge's* case came before the Supreme Court in 1819. See 6 Martin, 569. He had caused himself to be brought before the District Court, by a writ of *habeas corpus*. By the return of the jailor it appeared that he was committed on an execution from that court, and admitted to the bounds of the prison, having given bond according to law. The sheriff made oath that the plaintiffs in execution had not advanced the requisite sum, under the statute, for the debtor's sustenance; whereupon he was discharged, and the plaintiffs in execution appealed. It was contended that no appeal lay from a discharge on a writ of *habeas corpus*; that the proceedings were of the most summary kind, and could not be suspended or delayed by an appeal. But the court entertained the appeal, and renewed the decree of discharge.

In *Martin v. Ashcroft*, 8 Martin N.S. 313, the plaintiff had been arrested under a *ca. sa.* and was discharged on a *habeas corpus*, by an order of the judge at chambers, under the provision of the Code of Practice. The creditor appealed. The question was distinctly put, whether an appeal would lie to the Supreme Court; and objection was made by the appellee, upon two grounds: first, that it was taken from a decision on a writ of *habeas corpus*; and secondly, that the decree of the judge was not rendered in court, but at chambers. Both objections were pronounced insufficient. This court, said Porter, Justice, has decided it had not appellate jurisdiction from the refusal to grant a writ of *habeas*

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*corpus*, and, in a subsequent case, recognized the right of appeal from the discharge under such writ. *Laverty's case—Dodge's case*. These decisions, he continues, are not in the least contradictory. The first was, when the writ had been resorted to in a matter growing out of the administration of penal law. The second, where it was used to obtain a discharge from imprisonment, on a writ issued in a civil action. The refusal to grant the appeal in the one case, and its accordance in the other, did not proceed from the writ, but from the case in which it was resorted to. If, in a criminal prosecution, the court had not jurisdiction, because this tribunal cannot take cognizance of such matters; but, if the suit was a civil one, it had, because its jurisdiction in cases of this kind does not at all depend on the nature and form of the writs, or remedies, which the parties may exercise, but on the fact that the decision is final, or works an irreparable injury, and the amount in dispute is above \$300. The circumstance of the decision being given before the judge at chambers, and not in open court, does not, in our opinion, affect the right of appeal. The case commenced by petition to the judge, the proceedings were had under the provisions of the Code of Practice, which contemplate a summary trial, and from the decision either party had a right to appeal.

After considering the merits, the judgment of the District Court was reversed, and it was ordered that the *capias*, which was stayed by the decision of the district judge, should be proceeded on according to law, the appellee paying the costs of the appeal.

This opinion seems ever afterwards to have been regarded as a judicial landmark by the former Supreme Court.

It was clearly affirmed in *Chardon v. Guimblotte*, 1 La. 421, Judge Martin delivering the opinion of the court. *Guimblotte* had been held to bail, at the suit of his creditor, *Chardon*. A rule was taken to set aside the arrest. It was sustained, and the order of arrest was set aside. The plaintiff took a suspensive appeal from that decree. The defendant thus remaining in custody, and the sheriff refusing to discharge him, he applied for a writ of *habeas corpus*, was brought before the judge, and the sheriff showing no cause for his detention save the order of arrest which had been set aside, the prisoner was discharged. From this order of discharge the plaintiff prayed an appeal, which was refused, the judge being of opinion that an appeal did not lie from an order of discharge on a *habeas corpus*. The Supreme Court thought otherwise, and granted a mandamus. As the constitution had provided for appeals in all civil cases in which the matter in dispute exceeded in value the sum of three hundred dollars, they said it was clear that a party has a right to appeal from any decision in such case which works an irreparable injury; that if an appeal would lie from a decree made in open court, where the judge has the benefit of counsel, *a fortiori* it would lie when an order is granted at chambers, *ex parte*. Such an order might have as fatal a consequence as any other. The defendant, who was in custody upon a claim for \$50,000, had been released *ex parte*; and, if there was no remedy, might instantly remove out of the State, and place himself beyond the reach of his creditors. The court again recognized the distinction between civil and criminal cases.

The same doctrine was affirmed in *Hyde v. Jenkins*, 6 La. 427; and was again expressly recognized in the *State v. Judge of the Commercial Court*, 15 La. 194. Still later, in *Ex parte Lafonta*, the rule was acted upon apparently as a matter of course, the objection not being even raised.

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Being therefore of opinion that the grant of appellate jurisdiction in civil cases, under article 63, is substantially the same as was conferred upon our predecessors under the former constitution, and that the convention must be considered as contemplating the same judicial construction as had been adopted and followed during thirty years, the main point is this cause, so far as it depends upon article 63, seems to me to be clearly with the relators. To disappoint the intention of the convention would seem to be, to alter the constitution, and not to expound it.

But it is always an additional reason, if such were required, for holding fast to rules which have been consecrated by solemn and repeated decisions, if we believe them to recommend themselves not merely by the force of precedents, but by their consonance to justice and truth. I feel bound to acknowledge the reasonableness of a rule, which gives a party an appeal from a decree which may irreparably affect his interests; and looking rather to the effect, than to the form of the proceedings, discountenances an evasion of justice.

No one will deny that if *Patterson* had taken an ordinary rule upon the creditors, to show cause why he should not be discharged, the creditors, if dissatisfied with the decree, would have had the right to be heard on appeal. Reason, as well as the authorities cited, seems to forbid the debtor to defeat this right, by changing the mere form of the remedy.

What I have said seems to me conclusive upon the right to appeal in such a case. And, if so, the only question left is, whether the party can have that benefit in the devolutive form, or may take a suspensive appeal.

The reasoning in the cases cited, I think, covers this point. The principle upon which these decisions rest is that, the party has an interest which may be irreparably affected, and that the appellate jurisdiction of the court will be interposed to protect that interest. Why should the protection go half way? and why should a creditor, whose right to a suspensive appeal would be indisputable if the debtor had proceeded by an ordinary rule, be stripped of that right because the debtor has chosen another form of remedy? If the reasons upon which the right of appeal was recognized in the cases cited be sound, we must give creditors the full benefit of them. It would be almost a mockery to say to them, we will inquire whether your debtor was rightfully discharged; but, in the mean while, he shall have the opportunity of placing himself beyond your reach.

It is not my province to question the policy of laws which permit the incarceration of a debtor. Much of the ancient severity has been relaxed in modern times; but the right still exists in a modified form in our statute book, and is mainly aimed at the prevention and punishment of fraud. Those to whom the right is given should be protected in its exercise. It remains only to say whether the question in this cause is in any wise affected by the 67th article of the constitution.

After a careful consideration I am of opinion that it does not, so far at least as concerns the present subject, impair the appellate jurisdiction in civil cases which was conferred by article 63. It is an enlarging clause, extending the judicial power of the Supreme Court to cases not embraced by the jurisdiction of the former court, and was not intended to curtail the jurisdiction which the convention, using substantially the terms of the old constitution, intended to confer upon the present court, in the sense which a long course of judicial decisions had ascertained.

I think that the *mandamus* should issue as prayed for.

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KING, J. I concur in the foregoing opinion read by Mr. Justice Slidell, and adopt the reasons he has assigned. *Mandamus refused.*

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### BERTRAND v. ARCUEIL.

Proof of the existence of disease in a slave before the sale, and of his death from that disease within three weeks after the sale, raises a very strong probability that the disease was incurable at the date of the sale; and very clear and cogent proof should be required from the vendor to overthrow the presumption.

Art. 2518 C. C. which declares that "the redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were matched, as a pair of horses or a yoke of oxen," is inapplicable to the case of a family of slaves, consisting of a father and mother, sold as field hands, and their infant child. *Per Cur.* The right to a total rescision only arises, when the things sold are so dependant on each other for their usefulness, that the loss or unsoundness of one would render those remaining comparatively valueless, and where their natural dependence and peculiar fitness relatively to each other in a particular service, was the principal motive of the purchase. That the two examples given in art 2518 are mere illustrations of the rule, and that the principle may be extended to other things, is conceded; but the things must be *matched*, in the sense in which that term is used in the Code.

**A**PPEAL from the Parish Court of New Orleans, *Maurian, J. Soulé*, for the plaintiff. *Pilié* for the appellant. The opinion originally formed by the court in this case was pronounced by

SLIDELL, J. In May, 1847, the plaintiff became the purchaser at auction of three slaves, for a total price of \$1100, payable at one year. They were described in the advertisement as Harry, a field hand, Hannah, his wife, and their child, Huldah. The advertisement stated—"tous ces esclaves sont garanties des vices et maladies prévus par la loi, et sont recommandé sous tous les rapports."

The mother and child became seriously ill two or three days after their delivery to the purchaser, and died within three weeks after the sale. The testimony satisfactorily establishes that the disease of which they died existed in both anterior to the sale; and, although there was some conflict of opinion among the professional persons examined, we think the judge below correctly concluded that it had arrived at an incurable stage in both before the sale, although probably accelerated, in the case of the mother, by a miscarriage occurring after the sale. The existence of the disease before the sale, and the death from that disease within three weeks, raise a very strong probability that it was incurable at the date of the sale. Very clear and cogent proof that it was curable should be adduced by the seller, to overthrow the presumption. See *Desdunes v. Miller*, 2 N. S. 53. *Thompson v. Willburn*, 1. N. S. 460.

But it is contended that the plaintiff cannot maintain his redhibitory action, because he was aware of the existence of the disease before he accepted the slaves and gave his note for the price. That symptoms of disease were discovered by the physician employed by the plaintiff to examine the slaves is true; but there is no reason to believe that the physician, or the purchaser, were aware of its extent. Had the purchaser known the real condition of the slaves, we must suppose that he would not have made the purchase. We consider him as having believed the symptoms discovered to be temporary and not of a grave character, and as having given his note in good faith, relying not only on the warranty implied by the law, but on the express warranty and strong recommendation held out by the advertisement. See *Hepp v. Parker*, 8 N. S. 476.

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It is argued that the existence of redhibitory disease in two of the slaves did not authorise the rescision of the entire sale, and that the plaintiff is only entitled to a reduction of the price, according to a reasonable estimate of the several items of the sale made in block.

We have seen that the slaves were described in the advertisement as bearing towards each other the relation of husband and wife, and parent and child, and that they were sold for a total price. The solution of the question depends upon the just interpretation of article 2518 of the Code. That article declares that "the redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were matched, as a pair of horses or a yoke of oxen." In construing this article we must consider its spirit, and are not to limit it to the cases literally enumerated, which are given by way of illustration. The principle announced in it is found in the roman law, Digest, Lib. 21, title 1; the examples there given are the same as stated in our Code. We are there told that if horses are sold as a match, a redhibitory vice in one gives rise to a rescision of the entire sale; but that, if four unmatched horses are sold at a single price, the defects of one would not be a cause of a rescision of the entire sale; that the rule would be the same if slaves be sold together for an entire price, unless they could not be reasonably separated, as, for instance, if they were a company of tragedians, or miners. The doctrine as explained by the commentators is, that the mere entirety of the price is not decisive; but that the enquiry must be, when the things sold are alike principal objects of the sale, whether they have been sold as making a whole together, and as being such that one would not have been sold without the other, or whether they are independent one of the other. In the former case, the redhibitory vice of one of the things sold involves the right of exercising the redhibitory action for the whole. In the latter, the action can only be maintained with regard to the particular thing affected with the vice. See Merlin, Répertoire, *verbo* Redhibitoire. Pothier, *Contrat de Vente*, p. 142.

Now it may be true, as argued by the defendant, that the death of the slaves Hannah and Huldah did not affect the value of the slave Harry, with reference to the purposes for which he was bought, to as great an extent as in the case of the slaves forming a company of comedians, cited in the roman law. But the spirit of the rule is applicable. Slaves constituting a family would probably labor more cheerfully and harmoniously together, and, by consequence, would be more useful than those not so related; and besides natural justice and humanity would dictate that they should be sold together. It was in this just and benevolent sense that Voet, in his commentary on the Pandects, says: *Unde si duo jumenta sint vendita tanquam paria et unum in ea causa sit ut redhiberi debeat, utrumque redhiberi potest; idemque in triga atque quadriga vendita jaris est; uti et quoties res plures separari nequeunt sine magno incommode, vel ob rationem pietatis; veluti, ne liberi a parentibus, ne contubernio juncti a se invicem separantur ac divellantur.* Voet's Com. Lib. 21, title 1.

The counsel for the defendant has cited the case of *Andry v. Fox*, 6 Martin, 696, in which judge Martin, after learned argument, held that, although several slaves be bought together and for a single price, the sale will not be rescinded for all, if any number less than the whole have any redhibitory defect. We do not consider our present opinion as conflicting with that decision. It does not appear that the slaves in that case were members of the same family. If such had been the case, it could scarcely have been overlooked by the counsel or the court.

The case of *Ledoux v. Armour*, which was a sale of a number of coils of bale rope, certainly cannot be considered as covering the present case.

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We conclude, therefore, that the court below did not err, in rescinding the entire sale.

*Pilié*, for the appellant, for a rehearing. It is admitted as a general principle that, where one of several things sold together is tainted with a redhibitory defect, the sale should be rescinded for the whole, if it appear that the vendee would not have bought the others without it. But, in *Louisiana*, that principle has been narrowed down by art. 2518 of the Civil Code, to the only case where the things sold together are *matched* (*appareillées*). It is true that the examples mentioned in that article are cited by way of illustration, and do, by no means, prevent its being applied to other cases falling within its spirit. But those cases must necessarily relate to things that are *matched*.

It may be *probable*, as urged by the court, that slaves constituting a family would labor more cheerfully and harmoniously when together, than separated. But when a part of that family has died, I am at a loss to conceive how the rule can be made to apply to the survivors, who are severed from the others by the will of God.

Another ground relied upon is, that "natural justice and humanity would dictate that slaves so related should be sold together." I agree to that. But I submit that the direct and inevitable consequence of the rule established in the judgment complained of, would be to render very difficult, if not absolutely impossible, a compliance with those dictates of natural justice and humanity. For, no man being possessed of a family of slaves, would be prevailed upon to sell them together, if he knew that a vice or malady in one of them might expose him to a redhibitory action for the whole. To avoid the application of that rule, he certainly would sell them separately.

The passage quoted from Voët, which is but a repetition of what Ulpian and Paulus had said before on the same subject (*Muhlenbruchii Doctrina Pandectarum*, vol. 2. p. 579 no. 6593 *et seq.*), might have been entitled to much weight before the Code of 1825 was adopted. But under the Code of 1825, our position is different. Besides, the spirit of the remarks made by Voët, and before him, by Ulpian and Paulus, does not apply to cases like this. These authors suppose a case where the slaves sold are nearly related to each other, and say that, *ob pietatis rationem*, if one of them is to be returned on account of a redhibitory defect the other should also, because they ought not to be separated. *Hi non sunt separandi*, says Ulpian. And this clearly presupposes that the slaves afflicted with the redhibitory vice, are *living*. But if they are dead, and the restitution of the price is alone prayed for, it is plain that the *ratio pietatis* no longer exists, as the separation is one which man has not the power to prevent or remedy.

But admitting the old rule to be still in force, where is the proof that the plaintiff would not have purchased the surviving slave without the others? Is it not a fact of daily occurrence in this State, that slaves situated as these were, are sold separately? Was even this connection between the slaves mentioned in the notarial sale passed to the plaintiff? And although the circumstances of this connection may have induced the plaintiff to purchase the slaves in question, was it the *motif déterminant* of the purchase? unless this is shown, and it certainly was not in this case, the plaintiff cannot recover even under the old rule.

The judgment of the court (concurred in by three judges,) was finally pronounced by

KING, J. After much consideration, the majority of the court are of opinion, that the interpretation given to the 2518th article of the Civil Code, in the decision heretofore rendered in this case, extends the principle announced in that article beyond its just limits. We think that both the letter and the spirit of the law forbid its application to a case like the present, where the slaves sold bear to each other the relation of husband and wife, parent and child, two of whom have died of redhibitory diseases. The article is as follows :

"The redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were *matched* (*appareillées*), as a pair of horses or a yoke of oxen."

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That the two examples given are merely illustrations of the rule, and that the principle may be extended to other things, is conceded. But the things must be *matched*, in the sense in which that term is used in the Code. The examples given both in the Code, and in the authorities which have been referred to in illustration of the rule, we think show the spirit and meaning of the law to be, that the right to a total rescision shall only arise, when the things sold are so dependant the one upon the other for their usefulness, that the loss or unsoundness of one would render those remaining comparatively valueless, which mutual dependence and peculiar fitness of the things purchased relatively to each other in a particular service, formed the principal motive for the contract. We are of opinion that the rule does not embrace slaves sold together in families, as field hands, as was the case in the present instance, there being no such necessary dependence of one member upon another for its usefulness. If the principle be recognized to the extent contended for, then when large families are sold together for one price, as daily occurs, the death of one of its members, from a redhibitory defect, would give rise to the rescision of the entire sale. Yet it can scarcely be contended that the death of an infant, or of one of several children, would materially impair the value of the surviving father or mother. A case for a total rescision of the sale would probably occur, if the mother or child were affected with a redhibitory vice, and the child should be below the age at which the law permits them to be separated. A rescision of the sale as to one, would in that event probably vacate it as to the other. But this rule depends upon legislative enactment, founded on motives of humanity, and would cease to apply if death had severed the relation prior to the institution of the action.

We do not understand the correctness of so much of the opinion heretofore rendered, as determined that two of the slaves purchased by the plaintiff, to wit, the mother and child, died of diseases existing at the date of the sale, to be impugned. The evidence leaves no doubt that the third slave, *Harry*, died of a disease contracted several months subsequent to the sale.

Under the view which we now take of the law, the loss of the slaves *Hannah* and *Huldah*, must be borne by the defendant, and that of the slave *Harry* by the plaintiff. But as the evidence does not enable us to determine the separate value of the slaves, the cause must be remanded, for the purpose of ascertaining the deduction to be made from the rate given for the price.

The judgment of the District Court is, therefore, reversed, and the cause remanded for further proceedings; the appellee paying the costs of this appeal.

SLIDELL, J. *dissenting*. I adhere to the opinion formerly adopted in this case. I consider the sale of a family of slaves as coming within the spirit and intentment of art 2518. My reasons for that view have been already expressed, and I may add, by way of practical illustration, that I feel assured that any one desiring to purchase servants, if he had an offer of three slaves bearing to each other the relation of husband and wife, parent and child, as in this case, and of three others having equal physical and other qualities, but not so related, would give a higher price for the former than the latter.

I also consider the date of the sale the controlling point of time, to which reference is to be had. If the nature of the things sold was, at the date of the sale such as to subject the contract to the right of a total rescision, the subsequent events, adverted to by the defendant's counsel, ought not to be permitted to affect the right. The contract was completed between the parties, at the date of the sale. The legal incidents of a contract are not to be severed from the contract itself, of which they form a part. The right of rescision, if the things sold be



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affected with redhibitory vices, is as much a part of the contract, as the price, or any other ingredient of the contract. The law implies the right, and the implication of the law is as efficient as the expressed will of the parties. The case then stands as though it had been expressly written in the act of sale, the "vendee shall have the right to rescind the sale for the whole, should the father or mother of this family now sold be found to be affected with a redhibitory vice."

To the authorities cited in the original opinion, I may add the following from the Pandects:

Hoc edicto expressum circa paria mularum. Sed et quotiescunque manifestum est quem aut non venditurum, aut non empturum fuisse nisi omnia, una venditio videri debet, licet in singulas res sint pretia separatim constituta.

Plerumque propter morbosa mancipia etiam non morbosa redhibentur, si separari non possint sine magno incommodo, vel ad pietatis rationem offensam. Digest, lib. 21, tit. 1, s. 35.

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### THE STATE v. CROSBY et al.

It is no objection to the validity of an indictment that several offences of the same nature, and upon which the same or a similar judgment may be given, are charged in different counts.

A count for larceny may be joined, in the same indictment, with one for receiving stolen goods.

A *nolle prosequi* may be entered upon one count of an indictment, and a judgment claimed on the remaining count, even after a general verdict.

It is only in capital cases that juries are not permitted to separate after having been sworn. In cases not capital, it is discretionary with the judge, until his charge has been delivered, to permit the jury to separate.

**A**PPPEAL from the First District Court of New Orleans, *McHenry, J. Ellmore*, Attorney General, for the State, cited Chitty C. L. 252. Archbold C. P. (5 ed.) pp. 72, 73. Meedy's Crown Cases, 236. 12 Wendell, 429. 8 Ib. 210, 211.

*Wolf and Abell*, for the appellant, relied on 2 Hawkins, 331. 1 Blackford's Rep. 391, 431. The judgment of the court was pronounced by

KING, J. The defendant was tried upon an information, the first count of which charged him with the crime of larceny, and the second with having received stolen goods. After a general verdict of guilty, the attorney general entered a *nolle prosequi* upon the second count, and a judgment was given upon the first, from which the defendant has appealed.

A reversal of the judgment is asked for on the three following grounds: 1st. That two distinct offences were improperly charged in the same indictment. 2d. That the attorney general was without authority to discontinue the prosecution upon one of the counts after verdict. 3d. That the jury were permitted to separate during the trial of the cause, which vitiated their verdict.

I. Upon the first point the authorities establish conclusively that it is no objection to the validity of an indictment that, several offences of the same nature, and upon which the same or a similar judgment may be given, are charged in different counts. 2 Hale's P. C. 173. 1 Chitty C. L. 253. Wharton C. L. 106. The joinder of a count for larceny with one for receiving stolen goods, has been

held to be good both in England and the United States. In Pennsylvania, it is said to be the most usual practice to unite counts in one indictment, charging both of those offences, although in that State the receiving of stolen goods is only a misdemeanor. *Rex v. Galloway*, *Moody's Crown Cases*, 235. Wharton C. L. 108, and note. 12 Wendell, 429. 8 Wendell, 210, 211.

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II. In the case of the *State v. Banton*, ante p. 31, we held that after a general verdict, the attorney general could enter a *nolle prosequi* upon one count, and claim judgment upon the remaining counts. On a re-examination of the authorities we find no error in the decision then made.

III. It appears from the record that when the court had proceeded so far with the cause as to empanel a jury and swear a witness, the usual hour for adjournment, 3 p. m. arrived, and the court adjourned until the following morning, permitting the jury to disperse in the mean time. There is no complaint of misconduct on the part of the jury. It is only in capital cases that juries are not permitted to separate after being sworn. In cases not capital, it is discretionary with the judge to permit them to disperse, until he has delivered to them his charge. 8 La. 558. Wharton C. L. 644.

*Judgment affirmed.*

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### THE STATE v. McLANE.

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The stat. of 8th of March, 1841, providing that "in all criminal prosecutions in the Criminal Court of the First District, for crimes and offences punishable by not more than two years hard labor, the proceedings may be by information," was not repealed by the abolition of that court, and the substitution of other district courts by the constitution of 1845; and the stat. of 30th of April, 1846, organizing the district courts in the parish of Orleans, having directed (sec. 6) that all informations shall be filed in the First District Court, and this direction being necessarily understood as relating to all such informations as were authorized by the laws then in force, of which the act of 1841 was one, that act must be considered as extended to the First District Court.

A count for larceny may be joined, in the same indictment, with one for receiving stolen goods.

Though the different counts of an information be attached together by wafers, it is not necessary that each count should be signed by the prosecuting officer.

The different counts of an information are sufficiently identified as one proceeding, by being attached together by wafers.

It is discretionary with the judge of the first instance to direct the acquittal of one of several prisoners on trial for larceny and receiving stolen goods, that he may testify on the trial of the rest, if, in his opinion, the charge against him be unsupported.

**A**PPEAL from the First District Court of New Orleans. *McHenry, J. Elmore*, Attorney General, for the State. *Budd and Redmond*, for the appellant. The judgment of the court was pronounced by

KING, J. The prisoner was convicted of larceny, and has appealed. The proceeding against him was by information, which he contends was unauthorized by law.

The act of the 8th of March, 1841, provides, "that in all criminal prosecutions in the Criminal Court of the First District, for crimes and offences punishable by not more than two years hard labor, the proceedings may be by information." Acts of 1841, p. 59.

It is contended, on behalf of the appellant, that this act applies exclusively to the Criminal Court of the First District, which has been abrogated by the consti-

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tution of 1845, and that the law itself has been thereby virtually repealed, having become inoperative. It is further contended that, criminal proceedings in this State are to be conducted according to the rules of the common law, which restricts the use of information to misdemeanors.

We do not find it necessary to determine, whether informations may be filed for larceny in the district courts of the State generally. Our enquiry is limited to the propriety of the proceedings in the parish of Orleans. Previous to the adoption of the present constitution, the Criminal Court of the First District, had exclusive criminal jurisdiction within the territorial limits of that district. B. & C's Dig. 194. The 62d art. of the present constitution vests the judicial power of the State in a Supreme Court, in District Courts, and in justices of the peace; and the 73d art. confers upon District Courts unlimited jurisdiction in all criminal cases. Thus new tribunals have been created, which in the parish of Orleans, are clothed with all the jurisdiction in criminal matters formerly exercised by the Criminal Courts of the First District.

But, in substituting one set of courts for another, the framers of the constitution were careful to abolish none of the laws, in force at the time of its adoption, regulating judicial proceedings in the courts which were about to be superseded, and not to leave the newly created tribunals, in this respect, entirely dependent on future legislation. The constitution was prepared with reference to the then existing laws, and with the view of preventing the serious interruptions to judicial proceedings which it was foreseen would otherwise occur before the legislature could act. It was expressly declared, in the 142d art. that, "all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, *and all laws in force at the time of the adoption of this constitution*, and not inconsistent therewith, shall continue as if the same had not been adopted."

It is obvious that none of the laws regulating judicial proceedings were repealed by the adoption of the new constitution, and that while the framers of the constitution gave to the newly created tribunals all the jurisdiction, both civil and criminal, possessed by the courts which they were intended to replace, they also preserved the laws necessary to give them efficiency, and to enable them to exercise their respective jurisdictions in the same manner and to the same extent that they had previously been exercised. Among the laws then in force, applicable to the only court of criminal jurisdiction in New Orleans, was the act of 1841, authorizing proceedings by information. The legislature of 1846, while organizing the courts for the parish and city of New Orleans, in view of the previous legislation on this subject, which stood unrepealed, directed that the attorney general, and the district attorney, should file all informations in the First District Court. This direction must be understood to relate to all such informations as were authorized by the laws then in force, of which the act of 1841 was one.

The other grounds upon which a reversal of the judgment of the lower court is urged, are: 1st. That two distinct offences are charged in the same information, to wit, larceny, and receiving goods knowing them to be stolen. 2d. That only one count of the information had been signed, and that the two counts are merely attached together by a wafer. 3d. That the district judge erred in refusing, after the testimony on the part of the State had been closed, to permit a separate verdict to be rendered as to Stewart, against whom, it is alleged, no evidence was adduced, in order that he might testify in behalf of the remaining parties accused.

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I. The first ground has recently been considered, in the case of the *State v. Crosby*, ante p. 434, in which we sustained an information charging in different counts, as has been done in the present instance, the offences of larceny and of receiving stolen goods.

II. We have been referred to no authority in support of the position that, the different counts of an information should all be signed by the prosecuting officer. The practice, both in this State and under the system from which our rules of criminal proceedings are borrowed, is otherwise. The two counts were sufficiently identified as one proceeding, by being attached together, *State v. Lennon*, 8 Rob. 543.

III. It was discretionary with the judge to direct the acquittal of one of the prisoners that he might testify, if, in his opinion, the charge against him was unsupported. The judge, however, assigned as the reason for his refusal to direct a separate verdict, that he considered there was testimony against Stewart, and the jury appear to have been of the same opinion.

EUSTIS, C. J. *dissenting*. I concur in the opinion of my brethren, that the former legislation is to be left entirely out of view, in considering the right of the attorney general to institute this prosecution by information, with the single exception of the act of 1805, which establishes the common law as the rule of proceedings in criminal cases, and which has served as a guide for our courts ever since in criminal matters.

The reasons which have compelled me to withhold my assent to the conclusion of my brethren that, the law of 1841 is still in force, are these :

1. That law is of a peculiar character ; it is an exception to the general law of the State. It subjects the person committing a crime within the first district to prosecution at the will of the attorney general, against which, if the crime were committed in any other portion of the State, he would have been protected. 2. However convenient the prosecution by information of the offence of larceny may be in the administration of justice, and the law was passed undoubtedly to meet the exigencies created by the accumulation of criminal business in this capital, I do not consider that this mode of prosecution is necessary in a legal sense, that is, the mode of prosecution by indictment is adequate to ensure the punishment of all offenders. 3. The law of 1841 takes from the accused the protection of a grand jury. In criminal cases, except in misdemeanors, independent of this law, before the defendant can be put to answer the charge against him, the accusation must be warranted by the decision under oath of twelve men.

The Criminal Court of the First District having ceased to exist, and this law being recognised by no part of the act of 1846, organizing the District Courts, as I understand it, I do not feel myself at liberty to adjudge it to be saved by a remote and unnecessary implication.

I think the judgment ought to be arrested.\*

*Judgment affirmed.*

## STATE v. McLANE.

Decisions in *State v. McLane*, ante p. 435, affirmed.

\* The Chief Justice must be considered as dissenting from the judgment in the case of the *State v. Crosby*, ante p. 434, so far as that case, being a prosecution by information before the First District Court of New Orleans, under the statute of 8th of March, 1841, conflicts with the dissenting opinion in this case. H.

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v.  
McLANE.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Budd and Redmond*, for the appellant. The judgment of the court was pronounced by

KING, J. The offences charged, and grounds urged for a reversal of the judgment in this case, are the same as those in the case of the *State v. McLane*, just determined. For the reasons assigned in that case, the judgment of the District Court is affirmed, with costs.\*

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THE STATE v. HUNT.

The jurisdiction of the Supreme Court being limited by the constitution, in criminal cases, to questions of law alone, no appeal will lie from an order of the judge of the first instance, overruling an application for a new trial made on the ground of newly discovered evidence, where the application was refused by the judge because he did not believe the affidavit of the prisoner. *Per Curiam*: We cannot review, in criminal cases, the acts of a judge of the first instance, resting in his discretion. There is nothing in the stat. of 1846, providing for the mode of bringing criminal cases before this court, which affects the question under consideration. It depends upon the constitution alone.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. *Collins*, for the appellant. The opinion of the court was pronounced by

EUSTIS, C. J. *Oliver Hunt* was convicted of larceny in the First District Court of New Orleans, and was sentenced, for his offence, to two years imprisonment at hard labor in the penitentiary. He applied for a new trial, on his affidavit that he had, since the trial, discovered two witnesses, by whose testimony he could establish an *alibi*. The district judge overruled the application for a new trial, and *Hunt* has appealed from the judgment awarding the sentence.

We do not propose to examine the sufficiency of the affidavit; but to consider the question, whether this court, under the constitution, can review the decision of the district judge, in refusing the application for a new trial. The jurisdiction of this court in criminal cases extends to questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed. By the 33d section of the act of May 4th, 1805, for the *punishment of crimes and misdemeanors*, the rules of evidence and all other proceedings in criminal cases, except as otherwise provided, were to be according to the common law, changing what ought to be changed; and since that period, all our criminal statutes have been enacted and construed with reference to that system. It is therefore a safe guide, in construing the article of the constitution vesting this court with its limited criminal jurisdiction. Under the common law judgments can be reversed by writ of error, which lie from all inferior criminal jurisdictions to the court of Queen's Bench, and from the Queen's Bench to the House of Lords. A writ of error does not lie to the House of Lords for an error in fact; but, for an error of this description, a writ of error *coram nobis*, as it is there called, lies in the same court. This is the case in some of the States of the Union, where the courts, from their organization, can issue a *venire* for the trial of the error of fact. See case of *Arnold et al v. Duncan*, 14 Johnson's Rep. 417.

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\* The dissenting opinion of the Chief Justice, in the case of the *State v. McLane*, ante p. 437, applies to the opinion in this case.

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It seems to us to be clear, that the constitution, in limiting the jurisdiction of this court, in criminal cases, to questions of law *alone*, by its terms excluded all cognizance of questions of fact. The Supreme Court of the United States, in construing its common law jurisdiction, under the constitution, and the judiciary act of 1789—a jurisdiction by no means restricted as much as ours—has determined, by a series of decisions, what points are open for examination under a writ of error; and those decisions have all been made in conformity with what were understood to be the rules and principles of the common law. By the 22d section of the judiciary act, it is provided that on a writ of error to the Supreme Court, there shall be no reversal for error in fact. That court has always held, that error does not lie on the refusal of the court below to grant a new trial. Although that court takes no cognizance of criminal cases, except in a division of opinion of the judges of the court below, the decisions in civil cases appear to us conclusive of the principle. *Henderson v. Moore*, 5 Cranch, 11. *Barr v. Gratz*, 4 Wheaton, 213. *Blunt's lessee v. Smith et al.* 7 Wheaton, 248. *Brown v. Clark*, 4 Howard, 4.

In the case of *Barr v. Gratz*, Judge Story remarked that the proposition was too plain for argument.

Nor does error lie, on the refusal of the court below to continue a cause after it is at issue. *Marine Insurance Co. v. Hodgson*, 6 Cranch, 218. In that case, Mr. Justice Livingston says, it may be very hard not to grant a new trial, or not to continue a cause; but in neither case can the party be relieved by a writ of error. *Wood v. Young*, 4 Cranch, 237. 5 Cranch, 280. 7 Cranch, 152. 7 Cranch, 565 etc.

If this court cannot examine a question of fact in a criminal case, it cannot review the acts of a judge of the first instance resting in his discretion. In the present case, the judge did not believe the affidavit of the prisoner, that he could prove an *alibi*. He sat on the trial of the cause, he heard the witnesses, and had an opportunity of forming an opinion of the whole affair, with its attendant circumstances; and, we think, the constitution has provided wisely in leaving these matters in the discretion of the magistrate, who has the best means of thoroughly understanding them. If the facts attempted to be proved by the affidavit of the prisoner, were to be confessed in court by the attorney general, a different case would be presented; and cases have occurred, in which courts have acted upon the confession of the attorney general, on writs of error of errors in fact. *Rex v. Wilkes*, 4 Burrows, 2550.

In this case nothing is conceded; and a question of fact, which we are not permitted to determine, is an insuperable obstacle to the exercise of our jurisdiction, which is confined to questions of law *alone*.

There is nothing in the statute of 1846, which provides for the mode of bringing criminal cases before this court, which affects the question under consideration. It depends upon the constitution alone.

Previous to the adoption of the present constitution, the late Court of Errors and Appeals, in the case of the *State v. Charlotte*, 8 Robinson, 529, held that, under the statute creating the court, it was empowered to grant relief against decisions of inferior tribunals, in criminal cases, on questions confided to their legal discretion. The ground on which that decision was based was that the various decisions of the Supreme Court of the United States on that subject, were inapplicable to that court, because, under the statute creating it, the court was not a court of errors only. The insertion of the word *alone* in the consti-

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tution, confines the jurisdiction of this court exclusively to questions of law; and, on the reasoning of the Court of Appeals, the decisions of the Supreme Court of the United States would be applicable to the question of jurisdiction of this court.

*Judgment affirmed.*

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### MCGARY v. THE CITY OF LAFAYETTE.

Where a municipal corporation ratifies the tortious acts of its agents, it will be liable therefor, although those acts were not done by the authority of the city government.

The general rule in regard to the allowance of damages under our law is that established by art. 2294 C. C., by which the reparation must be equal to the injury. An exception is made to this rule by art. 1928 C. C. in relation to damages resulting from offences, quasi-offences, and quasi-contracts, which declares that in such cases much discretion must be left to the judge or jury; but this discretion is not unlimited, and, in this respect, our jurisprudence differs from that of England.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Rose-lius*, for the plaintiff. *Michel and Preston*, for the appellants. The judgment of the court was pronounced by

ROST, J. This case was before our predecessors on a former appeal, and the facts of it are fully stated in the opinion of the court, 12 Rob. 668. On the first trial in the District Court, the plaintiff obtained a verdict for \$10,000 damages, upon which judgment was rendered in her favor. The Supreme Court affirmed the judgment; but, on an application for a re-hearing, the majority of the court remanded the case for a new trial, principally on the ground that the damages were excessive. The court also intimated a doubt as to the liability of the corporation for the tortious acts charged against its officers. On the second trial the plaintiff obtained a verdict and judgment for \$5,000 and the defendants prosecuted the present appeal.

After the verdicts of two juries, the facts of the case must be considered as settled in favor of the plaintiff, and we have no hesitation in saying that those facts authorize the recovery of damages against the defendants. It is true the acts complained of were not done by the authority and order of the city government, but those acts, after they were done, were ratified by the corporation. *Thayer v. City of Boston*, 19 Pickering, 511. *Fowle v. Common Council of Alexandria*, 3, Peters, 398. *Ware v. Barataria and Lafourche Canal Co.*, 15 La. 168. *Mabe v. Canal Bank*, 11, La. 86.

Under this view of the law of the case, the only question left is, as to the amount of the damages allowed. The general rule of law under which damages are allowed, in our system of jurisprudence, is in these words: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." C. C. 2294. Under that rule, the reparation made must equal the injury inflicted. But an exception is made by art. 1928 C. C., in relation to damages resulting from offences, quasi-offences, and quasi-contracts. In those cases, says the Code, much discretion must be left to the judge or jury. The french text is: "*les dommages dans ces cas sont laissés en grande partie à la prudence du juge ou du jury pour leur fixation.*" This disposition of law while it gives to the judge or jury a discretion which they have not in other actions of damages, clearly intimates that the discretion thus given is not illimited,

and in this respect our jurisprudence differs from that of the english courts, upon whose authority the plaintiff's counsel relies.

Admitting that the verdicts of juries in those cases should not be disturbed on slight grounds, and that they ought to be maintained, although their amount is something larger than we approve, yet there is a limit beyond which it is our duty to interfere, and we think this a proper case for our interference. The defendants were entitled to the land they claim. The plaintiff being aware of that fact, had abandoned it for the public use, and put up a building on the last line given by the city surveyor. He is not entitled to be indemnified for the value of this land, and it is proved that the damage sustained by the taking down of the wall could not have exceeded three or four hundred dollars. We admit that the actual loss sustained is not the measure of damage, and that the jury had a right to take into consideration the violent and illegal proceedings of the officers of the corporation. The facts of the case would, in our opinion, have authorized a verdict for \$1500, and we will decree accordingly.

It is therefore ordered that the judgment in this case be reversed. It is further ordered that there be judgment in favor of the plaintiff and against the defendants, for the sum of \$1500, with the costs of the district court; those of this appeal to be paid by the plaintiff and appellee.

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v.  
LAFAYETTE.

### THE STATE v. LONG.

Decision in *State v. Hunt*, ante p. 438, affirmed.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. The judgment of the court was pronounced by

EUSTIS, C. J. The defendant has appealed from a judgment of the First District Court of New Orleans, condemning him to two years imprisonment at hard labor for the offence of larceny. Before the trial of the cause, the defendant applied for a continuance, on the ground of the absence of material witnesses, and made an affidavit to that effect. To the refusal of the judge to continue the cause, the defendant took a bill of exceptions.

This case is similar in principle to that of the *State v. Hunt*, just decided; and for the reasons therein given, the judgment of the District Court is affirmed, with costs.

### D'AQUIN et al. v. BARBOUR.

Parol evidence is admissible to show the nature and extent of premises leased by an act *seing privé*, when, from the indefinite language of the written instrument, it is necessary, to ascertain the intention of the parties.

Where the intention of the parties is doubtful, the manner in which a contract has been executed by one with the assent of the other, will determine the construction to be put upon it.

Antecedent conversations respecting a contract which the parties subsequently embody in a written instrument, are inadmissible, where fraud is not charged.

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v.  
BARBOUR.

**A**PPEAL from the Second District Court of New Orleans, *Canon, J. Wolfe and Singleton*, for the plaintiffs. *T. H. Howard, Larue and Ross*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. On the 28th October, 1848, a lease of certain premises, for a term of five years, was made by the defendant to the plaintiffs, who carried on the business of bakers; and the plaintiffs gave sixty notes for the monthly rent. On the 21st of March, 1849, the plaintiffs instituted this suit, claiming the dissolution of the lease with damages, on the ground that "the defendant has failed to deliver to the plaintiffs all the buildings by him leased to the plaintiffs, and indispensable for them to carry on their said trade. That the part of said buildings, [withheld] consists in a store adjoining the entrance of said establishment on Levée street, which, according to said lease, and in conformity to his promises, the said Barbour was bound to deliver to the petitioners."

Before considering the terms and effect of the lease, it is proper to notice the nature of the property of which the defendant was owner when the lease was made. It was a lot of ground having a front on New Levée street, and running back to Commerce street. Fronting on New Levée, was a brick building occupying the entire width, and three stories in height, and across the entire front, between the second and third stories, was a sign, "Union Bakery." The lower story, in front, was divided into nearly equal portions, by a partition. One portion, having a depth of about 32 feet, was arranged and occupied as a clothier's shop. It was rented in December 1847. for one year, by *Barbour to Mayers*, and this lease was renewed between them, in December, 1848. *Mayers* has been in possession during the whole period, carrying on his business of a clothier in this apartment. The other portion had been used since the erection of the building by *Barbour* as a baker's shop, having a like depth of thirty two feet. The entire width back of the baker's and clothier's shop's was used by *Barbour* for storing purposes, in his business of a baker. Back of this, and occupying also the entire width was a bakery, and still further in the rear were arrangements for horses and drays, used in his business.

The lease to the plaintiffs is in writing, and contains the following expressions and covenants: "The said lessor lets and hires to the said lessees, for the period of five years, commencing on the 1st November, 1848, the premises now and heretofore occupied by him as the Union Bakery, situated on New Levée street, and extending through to Commerce street; and further, the lessor lets and hires as aforesaid, and as a portion of said bakery, eight certain negroes, and certain other property, consisting of the steam engine, biscuit machine, troughs, bread-boxes, cloths, and the fixtures on the premises used in carrying on the business of said bakery, the whole of which are particularly enumerated and described in the inventory annexed, marked A., and accepted by the parties to this contract of lease as a portion thereof." This inventory contains the names and ages of the slaves, who are ranged under two classes with reference to their different values and rates of hire as specified in the lease; also an enumeration of the machinery, fixtures, and apparatus, of a baker's establishment. It is silent as to the apartment occupied as a clothier's shop. The lease then contains, among other clauses, the following: 1st. "The said lessees shall have the use and control of the said bakery and property, during the term of five years aforesaid, &c. 4th. The said lessor shall, according to law, keep that portion of the buildings in which said premises are contained in good tenable [*Sic* in lease] condition as the same now are during the period of said lease. 5th. The said lessor binds himself to sell

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to the said lessees, at the expiration of the second year of the period of said lease, *his premises and property*, at 98 New Levée embracing that described and enumerated in the said inventory, for the sum in cash of \$30,000." In the statement of the obligations of the lessees, we find the following: 1st. "The said lessees take the said *bakery and property embraced in said inventory*, in the good order and condition in which they now are, and engage, during the period of said lease, to keep the same in the like good order, &c. 2d. The said lessees shall incur all risk and expense resulting from the sickness or running away of the negroes, &c. 4th. And the said lessees bind themselves to pay to the said lessor the sum of \$4000 per annum, for the said *bakery and property aforesaid*," &c. And it is provided and agreed that if the said lessees should, at the expiration of the second year of the period of said lease, neglect to pay to said lessor the sum of \$30,000 as aforesaid in cash, for the premises aforesaid of 98 New Levée, and *property embraced in said inventory as vendees of said lessor and owner*, then and from the time of said sale and payment this instrument of lease shall be null and void, and the said lessor shall deliver to said lessees all of the said promissory notes given for the said rent, &c.

We have no hesitation in saying that, parol evidence was properly received by the court below, for the purpose of showing the nature and distribution of the property which forms the subject of the controversy. The property was described in the introductory clause of the lease, as the premises now and heretofore occupied by *Barbour*, as the "Union Bakery," situated on New Levée street, and extending through to Commerce street; and for the purpose of ascertaining the nature of the subject, parol evidence to show what premises were then, and had been theretofore, occupied as the Union Bakery, was proper and even necessary. The intention of the parties was to be ascertained, and that intention could not be reached without an explanation of the situation and nature of the property. See *Greenleaf on Evidence*, § 286, and the cases there cited. When that necessary explanation is brought into juxtaposition with the language of the instrument, both in the introductory clause and in those which follow it, it is difficult to resist the conviction that, the bakery and its appurtenances, as occupied by *Barbour*, was the object of the lease; and, that the apartment then, and theretofore occupied as a clothing store by another person, and which was not necessary for the business of the plaintiff, did not enter into their contemplation. It must be observed that the lot of land, *eo nomine*, is not leased. There is no sweeping expression in the leasing clauses, that would bring the entire premises under the lease. "The Bakery" is the repeatedly recurring expression. The fourth clause, in which the lessor binds himself only to keep in good order *that portion* of the buildings in which said premises are contained, appears to us quite repugnant to the construction claimed by the plaintiffs.

It is not to be supposed that, in making so important a contract, and in inserting the description "the premises now and heretofore occupied by him (*Barbour*) as the Union Bakery," the plaintiffs had not first carefully inspected the property which they proposed to lease. Its arrangement was before their eyes, and they saw an establishment occupied by another person and wholly disconnected with the business which *Barbour* had prosecuted, and in which they were about to succeed him. It is extraordinary, if they expected to get the clothier's shop under the lease, that they should not have expressed it in the written agreement.

We believe that in the stipulation for sale, the parties did intend to cover the entire property; but the language they use in those clauses which point to a sale, is certainly broader than is found in the stipulations of lease.

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The case of the defendant is much strengthened by resorting to the principle which is embodied in the 1951st article of the Code. "When the intent of the parties is doubtful, the construction put upon it by the manner in which it has been executed by both, or by one, with the express or implied consent of the other, furnishes a rule for its interpretation." Now here the plaintiffs went into possession of the bakery and the rest of the premises, but they did not ask *Mayers* to go out; they did not ask him to pay them the rent, nor give him any notice that he was to consider himself their tenant; and, without any objection whatever, so far as the testimony informs us, they seem to have contented themselves with the residue of the premises, and to have paid, as they fell due, the first four notes for rent, to *Barbour*.

Parol testimony was introduced, respecting the conversations of the parties while negotiating respecting the lease, for the purpose of showing that it was understood that the plaintiffs were to have the rent of the clothier's shop. We think these antecedent conversations respecting a contract which the parties have embodied in a written instrument, were inadmissible, there being no fraud in the confection of that instrument, or otherwise alleged or proved.

It is, therefore, decreed that, the judgment be reversed, and that there be judgment for the defendant, with costs in both courts.

### THE STATE v. VANDERLIP.

The description, in an information for larceny, of the party injured, as *I. B. Kirkland*, though his real name be *Isaac B. Kirkland*, is sufficient.

Where there is but one count in an information for larceny, those parts which are defective by reason of the failure to aver the value, may be rejected as surplusage, without affecting its validity; and the conviction as to the remainder will be good, under a general verdict.

Although, in general, it is necessary to use the precise technical expressions of the statute, in describing an offence, a variance which does not alter the sense of a material part of the statute, will not vitiate an information. As where a statute punishes "the robbery or larceny of *bank notes*, obligations" &c., and an information charges the larceny of "one note of the bank of Mobile," "one note of the bank of Alabama," "of the goods and chattels" &c.; the terms "bank notes" and "notes of a bank" being, in common parlance, synonymous.

It is sufficient in an information for larceny, under sec. 10 of the stat. of 4 May, 1805, to aver that the notes which were the subject of the larceny, were the "goods and chattels" of the person entitled to them; it is not necessary that it should be stated that they were his "property." The word "chattels," used in such a case, signifies property and ownership.

**A**PPEAL from the First District Court of New Orleans, *McHenry, J. Elmore*, Attorney General, for the State. 1. At common law there was no such thing as larceny of bank notes, bills of exchange, and promissory notes. See *Archbold's C. P.* p. 208, and the authorities there cited. 2d. The punishment for stealing bank notes, and monied obligations generally, is provided for by the act of 1805. *B. & C.* 243, sec. 10. 3. The name of the injured party is set out in the information, with sufficient certainty. See *Archbold's C. P.* p. 211, 212, 121, 122. 4. The statute having made the stealing of bank notes and monied obligations a punishable offence, no value need be assigned to them in the information. 3d *Chitty*, 247. *Russell and Ryan*, 406. 2d *Hale*, P. C. 182. *Archbold's C. P.* 211. *Reg. v. Morris*, 9 C. & P. 349. *Reg. v. Bingley & Law*, 5 C. & P. 602. *Commonwealth v. Smith*, 1st Mass. 244, 245. 5. The information is sufficiently descriptive of the property alleged to be stolen. See 3d section of the act, entitled "An act to provide for the prosecution and punishment of crimes therein mentioned," approved March 8th, 1845, p. 47, *Sessions Acts*. 6. Bank notes and monied obligations are goods and chattels. *Common-*

*wealth v. Boyer*, 1 Binney, 208. *Commonwealth v. Richards*, 1st Mass. 337. *People v. Holbrook*, 13 Johnson, 93. *United States v. Moulton*, 5 Mason, 544 *et seq.*, and the authorities there referred to.

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*Upton and Frost*, for the appellant. 1. Whatever is good cause of demurrer, is good in arrest of judgment. 1 Chitty, 662, 443. 4 Blacks. 376. For what is good cause of demurrer, see 1 Chitty, 439. 4 Blacks. 335. 2. An information must have the certainty of an indictment. 1 Chitty, 846—2, pp. 6, 7. 3. An indictment must contain no abbreviation nor figures, except where it embodies a copy of some instrument. 1 Chitty, 175, 176. Arch. 52. 4. The name of the aggrieved party must be given, if known; if not known, this fact of ignorance must be stated. 3 Chitty, 950—1. 1 Ib. 213, 216. Arch. 31. 5. The use of the initials of a man's name is fatal, because they are abbreviations, and because they do not constitute a name. 1 Pick. 388. 3 Ib. 263. Arch. 176. 6. An indictment must allege the value of each article stolen, and where a value is laid as to a part, and silent as to a part, and a general verdict is found, it will be bad. 1 Mass. 245. 3 Chitty, 948, 959. Arch. 176. 2 An. R. 741. 5 Mason, 301. 7. Information is defective in its description of the property. 1 Chitty, 172, 282. Arch. 48, 49, 50. 2 Russel, 170. 2 Leach, 1055, 565. 3 Chitty, 967—8, 947, and notes. 2 East. P. C. 601, 602. 1 Binney, 201. 1 Dyer, 5, B.

A correct indictment for the stealing of "bank notes," is in 2 Harris & Gill, 407. The cases in Leach all give the description as bank notes of a certain value, and the property of some person. This information charges the defendant with stealing notes of certain banks, and a draft—a value is only stated as to a portion, and they are described as "the goods and chattels," and not the "property," of *I. B. Kirkland*. These objections are purely technical, but they are sustained by authority; and we rely on the law as it exists. By a statute of 7 Geo. IV. many of these objections are no longer good on a motion in arrest of judgment. No such statute of jeofails has been enacted in this State, and the court must decide by the law as it existed in 1805.

In reply to the positions and arguments of the Attorney General: We deny that the allegation of value is dispensed with. Not a single authority quoted by the State bears out the proposition. Lord Hale says the value must be alleged. So says Archbold. The case in the Mass. Rep. is headed thus: "In an indictment for stealing money, value must be laid." The case in Russell & Ryan holds that, it is necessary to aver value to sustain a conviction. The reference from Archbold only recites that it is no longer necessary to *prove* value equal to the smallest coin. The point here is, whether a value should be *averred*.

Bank notes are not goods and chattels. If they are goods and chattels, why was it necessary to pass statutes making the taking of bank notes larceny?

The first and last points of the attorney general contradict each other.

The case in 1 Binney, presented ten points. The court decided the first in favor of the defendant, and declined to pass on the second. The case from 1 Mass. Rep. 137, did not present the point, and it was not made nor passed upon. The case in 13 Johnson is against us; and so is that in 5 Mason, 544. That is a decision of Judge Story, who never has been deemed the highest authority in criminal law. In that case he held that, bank notes were personal property. At the same term of the court, and in the same volume, he held that a promissory note was not personal property. We rely on the English authorities as fixing the definition of larceny, and the necessary averments of an indictment.

The judgment of the court (*Slidell*, J. absent,) was pronounced by

KING, J. The defendant was prosecuted under the 10th section of the act of 1805, B. and C.'s Dig. p. 243, for the larceny of several bank notes, and other effects, alleged to belong to *I. B. Kirkland*. He was convicted and sentenced, and has appealed.

It is urged that the information was defective, for the following reasons:

1. Because the name of the party aggrieved is not sufficiently averred.
2. Because the value of each of the articles charged to have been stolen, is not alleged.
3. Because the description of the property stolen is defective.
4. That the notes stolen are alleged to be the "*goods and chattels*" of *I. B. Kirkland*, whereas, it is contended, they should have been averred to be the "*property*" of the person injured.

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These objections to the information are, as was correctly said in argument, purely technical, and depend entirely upon authority.

I. As regards the first ground. The name of the injured party is averred in the information to be *I. B. Kirkland*. Upon the trial *Kirkland* appeared as a witness, and testified that his name was *Isaac B. Kirkland*; whereupon the counsel for the accused asked the judge to instruct the jury that the prisoner was entitled to his discharge; which charge the judge refused to give. As regards the description to be given in the indictment of other persons than the defendant referred to in it, *Hawkins* says: "It is certainly safest to describe them with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons. Yet when, in common presumption, it may be very difficult, if not impossible, to know the names of the persons referred to in an indictment, it may be good without naming any of them!" After giving several exceptions to the rule requiring the name of the injured party to be averred, he concludes by saying: "However, from the whole, thus much seems plainly to follow, that whenever the person injured is known to the jurors, his name ought to be put in the indictment." *Hawkins* P. C., book 2, chap. 25, sec. 73. In the case of the *King v. Sulks*, an indictment for larceny, laying the goods stated to be the property of *Victory*, Baroness *Turkheim* was sustained, although her true name was *Selina Victoria*. The court said it was not necessary that there should be an addition to the name of a prosecutor in an indictment; that all the law requires upon this subject is, certainty to a common intent; and that, as the prosecutrix had always acted in, and been known by the appellation of, Baroness of *Turkheim*, and could not possibly be mistaken for any other person, it must be taken to be her name, and referred to the authority of *Hawkins*." See the case in 2d *Leach* C. L. p. 1006.

An indictment for the forgery of a draft addressed to Messrs. *Drummond & Co.*, by the name of Mr. *Drummond*, without stating the names of *Drummond's* partners, was held, at a conference of all the judges, to be good. The judges said that they must understand the words "*Messrs. Drummond & Company*" as every body else did, to mean the partners in the partnership in the banking house. One of the judges said, the only question was whether *Drummond & Co.* were meant by the prisoner, which was established by the verdict. 2 *East*, P. C. 990. An indictment for an assault on *John*, parish priest of D, was held to be sufficiently certain. 2 *Hawkins*, P. C. chap. 25, sec. 74. In each of these cases, the party injured appears to have been known to the jurors, and in each the name is incorrectly stated. In the two first, the error consisted in omitting the christian names; and in the third, in omitting the surname.

In the present instance it appears that *Kirkland* was a merchant, residing in Memphis, in the State of Tennessee; that the package containing the notes, alleged to have been stolen, was taken while being transmitted to his correspondent in this city; and that it was marked *I. B. Kirkland*. It was shown on the trial that *Isaac B. Kirkland* was the owner of the notes and other effects contained in the package, and described in the indictment as being the property of *I. B. Kirkland*. It is not pretended that *I. B. Kirkland* and *Isaac B. Kirkland* are not one and the same person, and the owner of the effects stolen. That *Kirkland* was known by the name of *I. B. Kirkland*, is evident from the fact that he is so described in the information. But it is not shown that he was known to the attorney general, or in this city, by any other name than that of *I. B. Kirkland*, and being the resident of another State, we cannot presume that the attorney general knew him by any other name than that averred in the information.

It is only when the party injured cannot be described by name, that it becomes necessary to state that he is a person unknown. But with the evidence before him that the aggrieved party was known by the name of *I. B. Kirkland*, the attorney general could not, with propriety or truth, have averred the property in the notes to be in a person unknown. On the contrary, the rules of criminal pleading absolutely required that, he should have averred it to be in a person whom the evidence in his possession described as *I. B. Kirkland*.

We think that the circumstances of this case, tested by the strictest rules of criminal pleading, bring it within the exceptions to the general rule which require the name of the injured party to be accurately set forth, and authorize the averment as made in the information. See 1 Chitty, C. L. p. 212, *et seq.*

II. The information alleges that several different notes were stolen, but avers the value of but two of them.

The only authority to which we have been referred, in support of the proposition that sentence could not be passed on a general verdict upon an indictment of this kind, establishes, as we think, the reverse of the proposition. See 1 Mass. Rep. 245. If there had been several counts, instead of one, some of which averred a value to the articles stolen, and others which did not, it seems to be settled that, after a general verdict, judgment could have been given upon the good counts. When there is but one count, those parts of it which are defective, by reason of the failure to aver the value, may be rejected as surplusage, without affecting the validity of the instrument; and the conviction as to the remainder will be good.

III. The next objection is that, the description of the property stolen is defective. It is contended that the notes should have been described in the precise terms of the statute. The words of the act are: "The robbery or larceny of *bank notes*, obligations" &c. "shall be punished" &c. The averments in the information are: "one note of the *Bank of Mobile*," "one note of the *Bank of Alabama*," "of the goods and chattels."

Although, in general, it is necessary to use the precise technical expressions of the statute in describing the offence, a variance which does not alter the sense of a material part of the statute will not vitiate the indictment. The terms "bank notes," and "notes of a bank," are, in ordinary parlance, synonymous. Both are understood to mean the notes emitted as the circulation of the bank. In the case of the *Comm. v. Richards*, it was held that a deviation from the terms of the statute, similar to that which occurs in the information now under consideration, did not vitiate the indictment. *Comm. v. Richards*, 1 Mass. Rep. 338.. We think that case conclusive of the point presented.

IV. The last objection urged we also think untenable. In the case of *The People v. Holbrook*, 13 Johnson's Rep. 93, 94, an averment of the property, in the terms used in the present information, was held good. The court said: "It is sufficient to lay in an indictment that the notes or instruments mentioned in the statute are the *goods and chattels* of any person who is entitled to them; and that the word *chattels* denotes and signifies, when applied as in this case, property and ownership."

*Judgment affirmed.*

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#### WEST v. HIS CREDITORS.

Objections to evidence, though made in the lower court, will not be noticed on appeal, unless brought before the court by a bill of exceptions.

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The authority of the thing adjudged is merely an exception, which the party who wishes to avail himself of it must oppose, in the manner and at the time prescribed by law. Unless the exception be thus opposed, the party will be presumed to have renounced the advantage resulting from it.

A judgment, rendered in another State against one who had previously made a *cessio bonorum* here, though binding on him personally, is not conclusive against the other creditors, nor against the fund to be distributed here.

Creditors of one who had made a *cessio bonorum* here, residing in another State, where they had acted as trustees under an assignment, made to them in that State, by a third person, to secure the payment of the debt due them by the insolvent, where such assignment was valid by the *lex loci*, must account for the property included in the assignment, or show some legal cause for their failure to reduce it into possession, to entitle them to be put down as creditors on the tableau of distribution of the effects of the insolvent in this State.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. G. B. Duncan, Hornor, J. Strawbridge, Kearney and Cohen*, for the different appellants. The judgment of the court was pronounced by

ROST, J. In addition to those creditors who were allowed a place upon former tableaux in this interminable controversy, several others have presented themselves claiming a part in the fund now to be distributed. Of these new claims, the District Court ordered *William C. Galt* to be placed on the tableau for the sum of \$3,000. *J. Barbour, Francis Duplessis and Adélaide Duplessis*, who are creditors of the insolvent, have appealed from this portion of the decree. The claim of *N. B. Beale* for \$7,000, and that of *W. H. Booth* for \$5,000, were rejected by the court, and these parties also have appealed.

The evidence adduced by the creditor, *William C. Galt*, in support of his claim, satisfied the district judge; and a careful perusal of it has not enabled us to say that he erred. It is as satisfactory as could be expected at this distance of time; more so, indeed, than that on which many of the claims on the first tableau of distribution were admitted. 1 Annual, 365.

The claims of the appellants, *Beale* and *Booth*, rest on the following facts: Shortly after his failure, the insolvent went to the State of Kentucky, and was sued in the federal court of that State by these parties, as acceptor on bills of exchange, drawn by *Thomas R. West* on him, in their favor. *John K. West* defended the suits, alleging that *Thomas R. West* had made three assignments to these parties, in trust for the purpose of securing them in the payment of several debts due them by *Thomas R. West*, and also by himself, among which were the debts sued upon. The court overruled this plea, and the defendant filed his bill of exceptions to the ruling of the court, but did not carry the case to the appellate tribunal. The plaintiffs subsequently obtained judgments which are final against *John K. West* personally.

These judgments are adduced in evidence of the appellants' claims, and their counsel contends: 1. That, upon the trial of the oppositions, the district judge erred, to their prejudice, in admitting the deeds of trust in evidence to show that their claims had been paid; this issue having previously been made in the federal court, and the judgments rendered thereon forming *res judicata*. 2. That, under the constitution and laws of the United States, those judgments must have the same faith and credit in Louisiana as they have in the State of Kentucky, where they were rendered. 3. That they are the highest evidence of the debts merged in them.

If the first ground were well taken, it is not brought before us by a bill of exceptions, and we cannot notice it. The authority of the thing adjudged produces merely an exception, which the party wishing to avail himself of it must

oppose in the manner and at the time prescribed by law. *Item si in iudicio tecum actum fuerit, sive in rem, sive in personam, nihilominus obligatio durat, et ideo ipso jure de eadem re postea adversus te agi potest; sed debes per exceptionem rei judicatae adjuvari.* § 5, *Institutes, de Exceptionibus.* Unless the exception *rei judicatae* is thus opposed, and opposition is made to the admission of the evidence adduced on the second trial, the presumption is that, the party entitled to the exception has renounced the advantage resulting from it. *Merlin, Rep.* § 20, 4th edition, *verbo* Chose Jugée.

But this ground is untenable. Conceding that the judgments offered in evidence are entitled to the same faith and credit here as they have in Kentucky, it is necessary to ascertain the effect which they would have in that State. Our *cessio bonorum* is unknown to the laws of Kentucky; but assignments under those laws, when assented to by the parties named in them, produce substantially the same legal effects, so far as these parties are concerned. They divest the debtor of the title to the property assigned, and vest it in the trustees for the purposes of the trust. Such was undoubtedly the effect of the deeds of trust made by *Thomas R. West* to the appellants, after they assented to, and agreed to act under, them. Let us suppose then, that a creditor of *Thomas R. West*, not named in the assignments, had subsequently obtained a judgment against him. The question under consideration may be solved, by ascertaining what effect such a judgment would have had in Kentucky, and what rights it would have created in the trust fund.

Under the common law, which prevails in that State, the solution presents no difficulty. An assignment when made in good faith, and assented to by the assignee, is deemed a valid conveyance, founded upon a valuable consideration, and is good against creditors proceeding adversely to it by attachment, or seizure in execution, of the property conveyed. 2 *Story's Equity*, no. 1036.

Considering that *John K. West* was also divested of his title to the property in the hands of the syndic at the time the judgments of the appellants were obtained, we conclude that those judgments, although binding upon him personally, are not conclusive against the other creditors, nor against the fund to be distributed.

It is urged, as another ground against the admission of the assignments in evidence, that thirty years have elapsed since they were executed, and that that lapse of time should be a sufficient objection. If this were so, it could only be upon the presumption that they had been executed, and that the creditors named in them were paid and satisfied.

It is further urged that the assignments, having been executed by *Thomas R. West*, and not by the insolvent, the creditors of the latter have no right to call the trustees to an account; and that, if they had, it could not be done in this collateral manner. That if, at this late period, the trustees are liable to account to any one, it is to *Thomas R. West*, if he be living, if not, to his legal representatives, or to the creditors named in the assignments. It is said that these parties make no claim, and that the creditors named in the assignments must be presumed to have long since been paid. Under the terms of the assignments the two appellants were the first creditors to be paid; and, if we are to presume that those who came after them have all been satisfied, it is difficult to resist the conclusion that they stand in the same category.

It matters not by whom the assignments were made. They purport to deliver the possession of the property assigned, and were assented to by the



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appellants, who agreed to act as trustees under them. This assent and this agreement imposed upon them the implied obligation, to perform all those acts which were necessary and proper for the due execution of the trust which they had undertaken. 2 Story's Equity, no. 1268. Theirs is an equitable claim; and they are bound to do equity before they can be heard. It was incumbent upon them to account for the property assigned to them. It is stated by their counsel, in their brief, that they received none of the real property mentioned in the deeds of trust; but there is no evidence of that fact in the record, and they have failed to show a legal cause for not reducing it into possession. We are therefore of opinion that there is no error, of which they can complain, in the judgment appealed from.

Another opposition was filed by the syndic of *Dorsey* and the heirs of *Hull*. These opponents objected to the sum allowed to the wife of the insolvent. The defendant answered the opposition and pleaded *res judicata*, which plea was sustained by the court below. On the argument of the case, these opponents asked that the judgment sustaining the defendants' plea might be reversed. But as they have not appealed, we cannot act upon their application. *Girod v. Creditors*, 2 Annual 547.

#### SAME CASE—ON A RE-HEARING.

If a creditor of one who has made a *cessio bonorum*, who had proved a claim at the time of the first distribution of the effects of the insolvent, and received a dividend out of the funds then in the hands of the syndic, is not debarred thereby from proving, on a subsequent distribution, another and a distinct claim existing at the time of the failure, it follows, as a consequence, that new grounds of opposition may be set up against a claim allowed on a previous tableau, whenever a new fund comes into the hands of the syndic for distribution.

THE judgment of the court (*Eustis*, C. J. absent,) was pronounced by *Rost*, J. The appeal taken by the heirs of *Hull* in this case, was detached from the record, and was not brought to our notice till after the judgment had been rendered. Upon discovering this error, we granted a re-hearing as to them; and their opposition to the claim of *Mrs. West*, is now before us, on the plea of payment on one side, and of *res judicata* on the other.

On the first tableau of distribution filed, the claim of *Mrs. West*, and her right of preference, were contested by these opponents, on the ground that her mortgage, not having been recorded as required by the act of 1813, her claim was absolutely null and void. We disallowed the right of mortgage, but recognized the claim as an ordinary debt, to the amount of \$5,400. *West v. Creditors*, 1 Annual, 365.

It appears that, at the time this opposition was made, *Mrs. West* had received the sum of \$4,149 40, from the assignee of her husband, after his failure, in 1842. The opponents now plead this payment, and insist that *Mrs. West* has no claim to any portion of the fund in hand.

In the appeals taken from the judgments rendered on the oppositions to the second tableau of distribution filed by the syndic, we held that a creditor, who had proved a claim at the time of the first distribution, and received a dividend out of the fund then in the hands of the syndic, was not debarred thereby from the right of proving, on a subsequent distribution, another and a distinct claim, existing at the time of the failure.

We came to this conclusion by analogies drawn from the practice established under the bankrupt laws of England and of the United States, giving effect to the familiar rule that, where there is doubt upon a question of *res judicata*, the party against whom the plea is set up should have the benefit of that doubt. *West v. Creditors*, 3 Annual, 532.

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If, in subsequent distributions, creditors are permitted to set up new claims which existed when the first distribution was made, it follows that new grounds of opposition may be set up against their claims, whenever a new fund comes into the hands of the syndic for distribution.

It is proved that *Mrs. West* has received \$4,149 40, on her claim. That amount must be deducted from the sum of \$5,400, for which she is placed on the tableau.

It is therefore ordered that the judgment in this case be amended, so as to sustain the opposition of the heirs of *Hull* against *Mrs. West*, except for the sum of \$1,251 60, for the amount of which *Mrs. West* is to be classed in the tableau as an ordinary creditor.

It is farther ordered that the judgment, as amended, be affirmed.

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### SUCCESSION OF WARREN.

In a contest between the creditors of an insolvent succession, the notes or obligations of the insolvent are not conclusive proof of the debt of which they are evidence. They must be supported by such additional proof as will satisfy the judge of the fairness and justness of the claims.

**A**PPEAL, by the executors of *Barton*, from a judgment of the Second District Court of New Orleans, *Cannon, J. T. A. Clarke* and *Micou*, for the appellants. *Livingston*, for the administrator. The judgment of the court (*Eustis, C. J.* absent) was pronounced by

**SLIDELL, J.** As the succession of *Warren* is insolvent, and as the consideration of the notes of the deceased held by the appellants, and the genuineness and *bona fides* of their claim, were expressly put in issue, it was necessary for the appellants to produce some evidence, beyond the mere notes themselves. In *Sabatier et al. v. Their Creditors*, 6 Mart. N. S. 585, it was held that, in a contest between the creditors of an insolvent, the notes or obligations of the insolvent do not make in themselves conclusive proof of the debts apparently due to them. They must be supported by such additional evidence as will satisfy the mind of the judge of the fairness and justness of the claim. We are not aware that the opinion in that case has been questioned; and no argument has been adduced by the appellants against its correctness.

The district judge rejected a large portion of the appellants claim; and, after a careful consideration of the evidence, we do not feel ourselves authorized to say that his conclusions upon this question of fact were manifestly erroneous. If the whole amount represented by the notes was really due, it seems to us that there must have been ample evidence to support it within the reach of the holders. On the other hand, in view of the relations of the parties and the testimony respecting the acknowledgment of the deceased in his life time, it is difficult to resist the

SUCCESSION OF WARREN. conviction that he died in debt to *Barton*, in whose favor the notes were drawn, at least to the amount for which the district judge has rendered judgment.

We have considered the appellee's prayer for amendment, and are of opinion that the judgment requires no change. *Judgment affirmed.*

4 452,  
46 480.

### WILSON et al. v. CHURCHMAN.

A consignee, not a *bond fide* purchaser, and who has made no advances on the shipment, but is the mere agent of a consignor who had attempted to defraud his vendor of the price of the merchandize, has no greater rights than the vendee, and cannot defeat the vendor's privilege, where the vendee could not.

Where, after the shipment of merchandize and the delivery of bills of lading to the shipper, the merchandize is sequestered at the suit of the vendor claiming a privilege for the price, and the master of the ship gives the consignee prompt notice of the sequestration, and, in the mean time, takes such steps in the case as will arrest the action of the court until the consignee can assert his rights, the master will be excused for not delivering the merchandize, and may recover from the plaintiff in the sequestration an indemnity for his trouble and loss in unloading the goods, &c. But where the master, as agent of the ship owners, bonds the property, after having been notified by the sequestration that the vendor had been defrauded, it will be his duty, on arriving at his port of destination, to inquire into the circumstances of the consignee's title; and if he has any doubt as to it, to protect himself by a bill calling upon the vendor, the consignor and consignee, to litigate their rights among themselves; or, to refuse to deliver the property, if satisfied that the consignee was a mere agent, and not a consignee for value. Where the master, in such a case, after bonding the property, offers no proof that he has delivered the merchandize, nor that it is not still in his possession, he will be responsible for its value; and where the sequestration is set aside for irregularity, and no recourse can be had upon the bond, a personal judgment will be rendered against him for that value.

Though a bill of lading be a negotiable instrument, and import a title to the shipment in the holder, excusing him, as a general rule, from the necessity of proving that he has given any value for it, yet such proof is necessary where evidence has been offered to establish the want, or failure, or illegality of the consideration, or that the bill had been lost or stolen before it came into the possession of the holder. In this respect the exercise of the vendor's privilege under our Code is similar to the common law right of stoppage *in transitu*, which can be defeated by the negotiation of the bill of lading only where the transferee has received it in good faith and for value.

Where there was a want of due diligence on the part of one who applies for a new trial, and the evidence to introduce which it was prayed for was not discovered after the trial, and its character was such that the party was bound to know its materiality before the trial, and the affidavit does not disclose enough to make out a defence, a new trial will not be granted.

Where a writ of sequestration has been improperly issued, it cannot be aided by proof adduced at the trial on the merits, nor by admissions of fact contained in the subsequent pleadings, the observance of the requisites prescribed by law being in the nature of a condition precedent.

An affidavit for a sequestration, which states that the defendant is indebted to the plaintiff "in about the sum of \$4950," and that the "deponent verily believes the defendant will dispose of the property, or send it out of the jurisdiction of this court," not stating any specific sum as being due, nor the apprehension of the party that the property will be removed during the pendency of the suit, is insufficient. *Per Cur.* The word "during the pendency of the suit" may not be sacramental; but the necessity of the conservative process should substantially appear. Sequestrations, and other conservative remedies, by which the property of a party is wrested from his possession and taken into the custody of the law, before judgment, without notice, and upon the *ex parte* showing of the plaintiff, are extraordinary and rigorous, and hence the doctrine has been uniform that they are to be strictly construed, and that the requisites of the law must be observed upon pain of nullity.

**A** PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hunton and Micou* for the plaintiffs. *Lockett and Goold*, for the third opponents, appellants. The judgment of the court (*Eustis, C. J.* absent,) was pronounced by

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**SLIDELL, J.** On the 5th of January, 1848, the plaintiffs made a cash sale to *Churchman* of a quantity of flour, which was delivered. *Churchman* shipped it on board a vessel commanded by *Gilchrist*, bound to Philadelphia. *Churchman* received, as shipper, a bill of lading in the usual form, for the delivery of the cargo, in Philadelphia, to *Fleming*, or his assigns. After this bill of lading was dispatched by mail to Philadelphia to the consignee, the plaintiffs commenced suit against *Churchman*, and seized the flour on shipboard at New Orleans, under a writ of sequestration and a claim of the vendor's privilege. The sequestration was levied on the 10th January, and, on the 11th, *Gilchrist*, as agent of the ship owners, gave bond for the property, and was reinstated in its possession. On the 27th of January, *Gilchrist* filed a petition, by way of third opposition, in which he alleges himself to be master and part owner of the vessel. He states that the bill of lading had been given before the sequestration, and had been forwarded to the consignee; that the plaintiffs had made no offer to return the bill of lading; that he is bound to deliver the flour at Philadelphia to the consignee, or whoever may be the holder of the bill, and is entitled to the possession and custody of the property, in preference to the plaintiffs.

The cause came to trial, as between the plaintiffs and the third opponent, on the 28th February, 1848. No application was made for a continuance. The execution of the bill of lading, and its being mailed to *Fleming's* address before the levy of the sequestration, were proved. The plaintiffs proved the sale of the flour, *Churchman's* failure to pay, and that he was in failing circumstances.

We will not undertake to enter into a general discussion of the rights and duties of shipmasters, consignors, and consignees, but will confine our opinion to the rights and duties of the parties litigant, under the peculiar circumstances presented by the record.

It is certain that the plaintiffs' goods are gone, without their having received any equivalent for them. It is also certain that, if the Philadelphia consignee was neither a *bond fide* purchaser nor advancer, but was the mere agent of the consignor, who has attempted to defraud his vendor, the consignee would have no greater right to defeat the vendor's privilege than the vendee himself would have had.

The vendors took the risk of the consignee's being neither a *bond fide* purchaser nor advancer, and caused the goods to be sequestered. The allegations of the petition gave the captain full notice that the plaintiffs had been defrauded; and the judicial process would have excused the captain to the consignee for not delivering the goods, provided he gave the consignee prompt notice of the sequestration, and took, in the mean while, such conservative steps in the cause as would arrest the action of the court until the consignee could come in and assert his rights. Unquestionably the court would have given time for that purpose upon a proper application, and would also have indemnified the captain, at the plaintiffs' expense, for his trouble and loss in unloading the goods, &c. But the captain undertakes to bond the goods, and to carry them to Philadelphia. We are not prepared to say that he had not a right to take this course. It is unnecessary to determine that point. But if he had, the question is, what he should have done when he arrived there? With full notice that the plaintiff had been defrauded,

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it was his duty to inquire into the circumstances of the consignee's title and rights. If he had doubts as to those rights, he might probably have been permitted to protect himself by a bill of interpleader, calling upon the plaintiffs, the consignor and consignee to litigate *inter se*. Or he could have refused to deliver the goods, if satisfied upon inquiry that the consignee was a mere agent, and not a consignee for value. But the captain has not thought proper to show that he took any precaution whatever; or even that he has delivered the goods at all. *Non constat*, that they are not still in his possession. At any rate, if he has delivered the goods to the consignee, he has not offered any evidence whatever to show that the consignee was rightfully entitled to receive them, as against the plaintiffs.

Under these circumstances, we think that the case is with the plaintiffs; and that the captain has no right to rely upon the naked fact that, he had signed and issued a bill of lading.

It is said that a bill of lading is a negotiable instrument, and imports a title to the goods in the holder of it. But must this be taken without qualification? A bill of exchange is a negotiable instrument, and the holder is *prima facie* a holder for value. He is not bound to establish that he has given any value for it, until the other party has established the want, or failure, or illegality of the consideration; or that the bill had been lost or stolen before it came into the possession of the holder. It is then incumbent on him to show that he has given value; for, under such circumstances, if he has not given value he ought not to be placed in a better situation than the antecedent parties through whom he obtained the bill. See Story on Bills, § 193.

So in the case of a bill of lading. The plaintiff having established his claim as vendor, the bad faith of the vendee, and a clear right to the vendor's privilege if Churchman's interest had not been divested in favor of Fleming for value given *bonâ fide*, Fleming, in a contest with the plaintiff, would have been driven to show the nature and circumstances of his interest.

By what right can the captain undertake Fleming's case, and claim to stand in a better position? His argument for withholding the goods from the plaintiffs is, that he has signed a written promise to deliver them to Fleming; but, if Fleming was in bad faith, or was a mere agent, he could not have succeeded in doing what the captain insists upon doing for him.

It is very true that the right of stoppage *in transitu*, under the law merchant, which bears, in some respects, a strong analogy to the exercise of the vendor's privilege under our Code, is defeated by the negotiation of the bill of lading. But this rule must be understood with this qualification, that the transferee has received it in good faith and for value.

In *Cumings v. Brown*, Lord Ellenborough said that, if the assignee of the bill of lading knew that the consignee was in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid, in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would be an act done in fraud of the consignor's right to stop *in transitu*, and would therefore be unavailable to the party taking the bill of lading under such circumstances, and for such purpose. He recognized, as the true criterion, that suggested by Mr. Justice Buller—does the purchaser take it fairly and honestly? See also *Eden on Bankruptcy*, 313 *et seq.* See *Lickbarrow v. Mason*, Smith's Leading Cases, 507. *Cumming v. Brown*, 9 East, 514. *In re Wisbyinthus*, 5 B. and Ad. 817. 3 Kent's Com. 216. *Abbott on Shipping*, 514 *et seq.*

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The court below gave judgment dismissing Gilchrist's opposition, and a motion was made by him for a new trial, which he accompanied by affidavit that he arrived at the port of New Orleans, on his return from Philadelphia, a few hours after the trial of the cause; that he could prove by a witness at Philadelphia, that he had delivered the flour to *Fleming*, who had received the bill of lading in due course of mail, and accepted bills to the amount of \$3000; that he had not discovered the materiality of this testimony until after his arrival here, and had no representative here who knew the facts. The affidavit referred to a certificate by the proposed witness, who states that he was in the employ of *Fleming*; that the letter enclosing the bill of lading was received in due course of mail, and that *Fleming* accepted drafts for \$3000, drawn against the shipment. The new trial was refused.

We cannot with propriety interfere with the ruling of the court below, nor say that the discretion which the law confers with regard to new trials, was improperly exercised. There was a want of due diligence. The testimony itself was not discovered after the trial. Its materiality the party was bound to know before he went to trial, and he might have asked a continuance. Besides, the affidavit does not disclose enough to make out a defence. It is not stated *when Fleming* made the advances, nor that they were made in good faith and before notice. *Non constat*, that the consignee involved himself before *Gilchrist* arrived at Philadelphia with the goods. It would be a very dangerous precedent to reverse a judgment and remand a cause for new trial on so loose a showing. There may be hardship in this case; but if there be, it must be attributed to the party's want of diligence and caution. We cannot break down well settled and wholesome rules of practice, in order to reach the supposed hardship of a particular case. It is proper also to observe that the third opponent, on his part, has held the plaintiff to strict practice.

It remains only to consider the correctness of the refusal of the District Court to set aside the sequestration.

For the purposes of this inquiry it is necessary to lay out of view the subsequent testimony in this cause, and to look only to the proceedings which preceded the levy of the writ. If the writ improperly issued, it cannot be aided by the proof adduced at the trial on the merits, nor even by the admissions of fact contained in the subsequent pleadings, the observance of the requisites prescribed by law being in the nature of a condition precedent. It is proper to add that there was no implied waiver of irregularities, the rule to set aside having been taken *in limine litis*.

The grounds of the rule were that the affidavit is insufficient, the party not swearing to any specific sum as being due, nor to his apprehension that the property would be removed during the pendency of the suit. The affidavit is in the following words:

"*George W. Wilson*, one of the firm of *Wilson & Gleason*, merchants, trading and residing in the city of New Orleans, being duly sworn, deposes and says that *Samuel Churchman*, merchant, trading and residing in the city of New Orleans, is justly and truly indebted to the said firm of *Wilson & Gleason* in about the sum of forty-nine hundred and fifty dollars, for this, to wit: On the 6th day of January, 1848, *Wilson & Gleason* sold to the said *Samuel Churchman*, through his broker, about nine hundred barrels of flour, at five dollars and fifty cents per barrel; the said flour so sold has been delivered, and payment for the same has not been made. Wherefore deponent prays, in consideration of lien or privilege, that the said *Wilson & Gleason* have as vendors of the property sold, that a writ of

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sequestration issue, and the said flour so sold be sequestered, as deponent verily believes the said *Churchman* will dispose of the same, or send it out of the jurisdiction of this court."

It will be observed that, the amount sworn to is not a sum certain, and that the necessity of a sequestration for the protection of the parties privilege, is not clearly deducible from the language used. It was correctly said in *Sellick v. Kelly*, 11 Rob. 149, that it is not the mere existence of a privilege that gives the right of sequestering property; there must be also a well founded apprehension that the party will be deprived of its exercise, unless aided by the process of the court. If there is not danger that the property will be removed before the party can have the benefit of his privilege, the writ ought not to issue, and the existence of this danger should appear from the affidavit. We are not prepared to say, that the party should in this particular case, have sworn *totidem verbis*, that he feared the property would be disposed of, or removed, "during the pendency of the suit." Those expressions may not be sacramental under the Code and statutes in this particular case, but the necessity of the conservative process should substantially appear. The affidavit does not say when *Churchman* will dispose of the property, or send it out of the jurisdiction of the court. The affidavit would be consistent with truth, even if, at the time, the plaintiff was convinced that the property would not be disposed of, or sent away, before a judgment could be obtained and a *feri facias* issued. Nor is this uncertainty cured, but, on the contrary, it is increased, by considering the context of the affidavit. *Non constat*, that the price was due, or even if due, that it had never been demanded. The whole showing is loose and uncertain.

Sequestrations and other conservative remedies by which the property of a party is wrested from his possession, and taken into the custody of the law, before judgment, without notice, and upon the *ex parte* showing of the plaintiff, are extraordinary, and rigorous, and hence the doctrine has been uniform, that they are to be strictly construed, and that the requisites of the law must be observed on pain of nullity. *Graham v. Burckhalter*, 2 Annual 415. *Bres v. Booth*, 1 Annual, 308. *Friedlander v. Myers*, 2 Annual, 920. *Sellick v. Riley*, 11 Rob. 158. *Lacey v. Kenley*, 3 La. 18.

As we deem it our duty to set aside the sequestration, and the plaintiffs are thus deprived of a recourse upon the bond, it is necessary to make provision for a personal recourse upon the third opponent, and we shall do so, by remanding the cause for the purpose of ascertaining the value of the flour at the date of the bonding, and for the rendition of a judgment accordingly against the third opponent.

It is therefore decreed that, the judgment dismissing the opposition of *Gilchrist* be affirmed. It is further decreed that, the judgment on the rule to set aside the sequestration be reversed, and that the said sequestration be set aside; the costs of the sequestration, of said rule, and of this appeal, to be paid by the plaintiffs. It is further decreed that, this cause be remanded for the sole purpose of ascertaining the value of the flour sequestered at the date of the bonding thereof by said *Gilchrist*, and of rendering judgment for such value, in favor of said plaintiffs, against said *Gilchrist*, with interest from the date of such bonding and costs, subject to credit for such portion of the price of said flour as the said plaintiffs may have received from *Churchman*.

## HARTWELL v. WALKER.

Where an agent, authorized to purchase grain for his principal, contracts with a third person to take "all the grain he could deliver within a certain time," the contract will not be binding on the principal. *Per Cur:* The agent undertook to bind his principal for the purchase of grain, but the other party did not bind himself to sell any. Principals may make what contracts they choose; but the power to make a contract of this sort cannot be deduced from any general authority.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J. Micou*, for the plaintiff. *Grymes, Elmore and King*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff, who resides in Cincinnati, sues the defendant, who is a merchant in the city of New Orleans, for the sum of seven thousand three hundred and twenty nine dollars. The cause of action alleged is, that the plaintiff, in April, 1847, entered into a certain contract or contracts with the defendant, represented by his agents, by which the defendant agreed to purchase from the plaintiff certain large quantities of oats, at the price of fifty and fifty three cents a bushel, beside the charges from Cincinnati, where the contract was made, to New Orleans; that the defendant agreed to pay for said oats in cash on demand, or by the acceptance and payment of drafts drawn on him, for the price thereof, by his said agents. The plaintiff charges that, under his contract he made several shipments of oats to the defendant, which were paid for in cash by his agents in Cincinnati, or by bills on New Orleans; but that, in consequence of the fall in the market value of oats, and for no other reason he, the defendant, refused to receive and pay for certain other shipments made by him, the plaintiff, under the contract; that under an agreement made between him and the defendant, a portion of these shipments were received by the latter, at the current market price, without prejudice to the ulterior claims of the plaintiff; that other shipments arriving the defendant refused absolutely to receive them, and they were sold at auction, after due notice and advertisement, on his account, at a considerable loss. For the deficit on these operations, and the loss, charges and damages incident thereto, this action was brought.

The general issue is pleaded by the defendant, and the plaintiff is expressly charged in the answer, with having combined with one of his agents, for the purpose of defrauding him. The plaintiff had judgment in the District Court for the sum of six thousand two hundred and thirty seven dollars and sixty seven cents, with interest, and the defendant has appealed.

The manner in which the cause has been presented to us by counsel, limits our enquiry to the operations under one single contract, and, if they are excluded from the general account between the parties, the balance will be in favor of the defendant. This contract was made with the plaintiff by *John G. Wasson*, the agent of the defendant, on or about the 19th April, 1847, and we give it in the language of *Wasson*, who was examined as a witness; "The contract was that the witness would take from *Mr. Hartwell* all the oats he could deliver between that date and the 1st of June, 1847, at fifty three cents per bushel, delivered in Cincinnati. In pursuance of this contract of about the 19th of April, the oats were delivered by *Mr. Hartwell* in quantities, and at the rates specified in the accounts marked A."



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The plaintiff recovered in the District Court on the ground that, *Wasson* was the general agent of the defendant, he having been sent to the western country for the purpose of making large purchases of grain and horses, which the defendant was selling for the use of the army in Mexico; and it is contended by the counsel for the plaintiff that this contract was ratified by *Davenport*, the principal agent of the defendant in the west.

Conceding that *Wasson* and *Davenport* had full power from the defendant to contract for the sale and delivery of oats with the plaintiff, it is evident that the contract made by *Wasson* did not secure to the defendant a single bushel of oats. *Wasson* undertook to bind his principal for the purchase of oats, but *Hartwell*, the plaintiff, did not bind himself to sell any. *Hartwell*, by this agreement, had the range of the market, at a time when the article was peculiarly liable to fluctuation in value, for the space of six weeks; if it fell in value, any quantity—all the oats he could deliver—could be put upon the defendant at fifty three cents a bushel; and if it rose, the defendant could have no benefit from the agreement. Principals can make what contracts they choose; but we do not understand, how the power to make a contract of this kind, on the part of an agent, can be deduced from any general authority. Story on Agency, nos. 21, 62, 68. The defendant certainly gave his agents no authority to bind him to this extent.

Under this view of the subject it is unnecessary to enquire whether *Wasson*, in his contracts for oats, exceeded the limits of prices prescribed by the defendant, or to examine the other questions raised by counsel on the argument of the cause.

The judgment of the District Court is therefore reversed, and judgment rendered for the defendant, with costs in both courts.

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#### TERRY v. HENNEN.

An entry, and payment of the price, of a portion of the public lands subject to entry, does not divest the title of the United States; the title is not divested until a patent has been issued. The purchaser acquires only an equitable title, subject to the discretion of Congress; but such a title is sufficient to sustain a petitory action.

The payment of the price of public lands of the United States, entered without warrant of law, can in no manner affect the rights of the government. No equitable title vests in the purchaser, whose only claim is for the return of the money paid by him.

The constitution of the United States vests in Congress the exclusive power to dispose of, and make all needful rules and regulations in relation to, the public lands. The State courts have no authority to interfere with the primary disposal of the soil. That power rests exclusively with the general government, which has from the beginning acted upon it by legislation, through boards of commissioners, receivers, and registers, under the final supervision of the secretary of the treasury; and the decisions of that officer, made within the jurisdiction vested in him, cannot be reviewed by us.

The sale of a thing belonging to another is null.

The rightful owner of receipts, given by the receiver of public monies, for the price of public lands sold without warrant of law in the Greenburg land district in this State, must be considered as the person meant by the word "*grantee*," in sec. 1 of the act of Congress of the 29th August, 1842, providing for the refunding, under certain circumstances, of money paid for public lands in that district; nor will a sale, by authentic act duly recorded, of the lands, which does not transfer the receipts, or make any mention of them, nor the execution of an act under private signature, purporting to be a transfer of the lands to a person with whose money the transferrer acknowledges in the act that he purchased them, amount to such a transfer of the receipts as will entitle the vendee or the furnisher of money to claim the amount of the receipts from the treasury. *Per Cur*: In the transfer of

debts to a third person, the delivery takes place between the transferor and the transferee, by the giving of the title. C. C. 2612. The titles in this case are the receipts; and by "*grantee*" the act of 1842 means the owner of them.

Without an assignment, or proof of actual delivery, the possession of the receipts given by a receiver of public moneys for the price of public lands, will give the holder no better title to them than he would have to a promissory note payable to the order of the purchaser of the lands, held by him without endorsement or proof of transfer and delivery. Art. 2612 C. C. supposes that when the title is not transferable by delivery, and does not bear upon its face evidence of the lawful possession of the holder, proof of the delivery must be made.

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**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.*  
*Hoffman*, for the plaintiff.

*Halsey*, on the same side. Defendant founds his pretensions on a document purporting to be a transfer of the lands from *Lea* to him, in which *Lea* states that he had entered them with the money of the defendant; and upon a receipt signed by *Lea*, dated March 1836, for \$900, to be used in entering lands for the defendant. The plaintiff objected to the introduction of these documents, on the ground that they were "*acts under private signature, and inadmissible as evidence against the plaintiff.*" As evidence of a sale, the act of transfer was inadmissible. C. C. 2417. As evidence that the lands were entered with defendant's money, and that *Lea* received the sum of \$900 for that purpose, the act of transfer and the receipt would have been inadmissible, had they been authentic acts; as private acts, besides that objection, they were subject to this, that they had no date as against the plaintiff, except from the day of their production in court. The sale to the plaintiff was prior to that to the defendant. It was recorded in July, 1837; that to the defendant was not recorded until 1845. 7 N. S. 662.

The defendant's evidence, if admissible, proves that *Lea* entered the lands in his own name. If he bought them with the defendant's money, and intended them for the defendant, the defendant had perhaps an action against him for a title. But the title was in *Lea*, and he could convey the lands to any one. The plaintiff purchased them, and in good faith. The title is in him, and he is not affected by the equities existing between *Lea* and the defendant. The plaintiff is *Lea's* grantee, and the claim belongs to him. This is the express provision of the act. It is obvious from the proceedings before the department at Washington, that the only question at the time the parties were referred to a court, respected the title to the lands. The department could not determine which of the parties was the grantee. The decision of this question is conclusive of the dispute, for the claim does not exist except by the act of 1842, which gives it to the grantee.

But the defendant, knowing that he had no right to the lands, and could not claim the return of their price as grantee of *Lea*, alleged that no title passed from the United States to *Lea*, that there was no purchase by the entry, and therefore the payment of the price was a mere deposit of so much money, for which the United States are responsible to him, as owner of the money deposited.

It is certainly not essential that a title should have passed to *Lea* by the entry, and from *Lea* to the plaintiff by the act of sale. The act of 1842 gives the claim to the person who entered the lands, or his grantee. The plaintiff and the defendant are both grantees in name, but the priority of the plaintiff's purchase gives him an equitable preference to the defendant. Supplement, P.

But the position assumed by the defendant, that no title passed by the entry is untenable. There is nothing in the act to the contrary. Congress authorized the return of the price of lands in the district, not because no sale had been made, but because the surveys were erroneous and imperfect; because the lands were incorrectly located, the actual locations either conflicting with prior claims, or the proper locations so conflicting or differing from those exhibited to the purchasers at the time of entry. There is nothing in the act of 1842, that implies that the lands had not been sold. The implication is rather, that the lands had been sold, and the treasury department have so considered, since they have required in every instance of an application under the act, a certificate that there was no mortgage on the land of the applicant, or conveyance of it from him.

It being certain that the public lands of the district were subject to purchase, the entry by *Lea* at the land office was a purchase from the United States,

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and, unless these lands were covered by a prior claim or reserved, vested a title to them in *Lea*. *Beaumont v. Covington*, 2 Rob. 190. *Carroll v. Safford*, 3 Howard, 450-61.

Let us examine the defendant's pretensions, without reference to the act of 1842, and as if the United States were responsible as an individual. We cannot, for the reason that there was not a valid sale of the lands, consider the money a deposit. It was not left and received in trust, but *paid*. Admit that the sale was not valid, the transaction was not the less a sale. If so, the right to the return of the price arises from the failure to convey the lands, for which the price was paid. If *Lea*, the purchaser, held the lands, the legal right to demand the price would be in him; but a court of equity, on proof of *Lea's* fraud, would give the price to the defendant. But *Lea* has sold to the plaintiff, and as the price is due only in consideration of the loss of the land, it is not due to *Lea* until the plaintiff has called on him to refund the price between them, and so returned the loss of the land upon *Lea*. If *Lea* has no claim, the defendant, whose claim is an equitable preference to *Lea*, has none, unless its cause exists against the plaintiff; that is, unless the plaintiff was a party to *Lea's* fraud.

Let us now suppose that the United States, being owners of the lands, offer to return to the plaintiff, *Lea's* grantee, the price paid by *Lea*, and that the plaintiff accepts the compromise. *Lea* and the defendant have no right to the price; and therefore neither of them can prevent this compromise between the United States and the plaintiff. The act of 1842 was such an offer on the part of the United States, and the application of the plaintiff for the price an acceptance of the offer. The defendant had no right to interfere and oppose the payment of the money to the plaintiff.

*Grymes*, for the appellant.

*D. N. Hennen*, appellant, *pro se*. I. The claim of the plaintiff to the land certificates in defendant's possession, being founded on a notarial act of sale from *Lea* of the lands therein embraced, while the defendant's possession and property therein is justified by the evidence on record that the entries were made by *Lea* for his use and with his money, the question whether lands form the subject matter of consideration, or money held in trust and represented by these certificates must be decided by the laws of the United States. The constitution of the United States, art. 4, § 3, vests in Congress the exclusive power of disposing of, and making all needful rules and regulations in relation to, the public lands. The ordinance of July 13, 1787, 1 Land Laws, pp. 23, 187, prohibits the States from making laws interfering in any manner with the primary disposal of the soil by the United States. Land can only become subject to the operation of the laws of a State, on being separated from the public domain, and divested from the United States by a patent. *Wilcox v. Jackson*, 13 Peters, 516, 517. *Jourdan v. Barrett*, 4 Howard, 184.

II. The application by *Lea* for the entry and purchase of the lands in the certificates claimed, conferred no legal or equitable title on him to said lands. The legal title is conveyed by the patent alone. *Wilcox v. Jackson*, 13 Peters, 498. *Stringer v. Young*, 3 Peters, 320-344. *Broadman v. Lessees of Reed and Ford*, 6 Peters, 328-342. *Bagnal v. Broderick*, 13 Peters, 436-450. *Brush v. Ware*, 13 Peters, 93, 107, 108. The applicant for entry and purchase acquires at best an equitable title. As such, the holders of land certificates have been considered as having such an interest as would enable them to bring a petitory or possessory action. *Metoyer's case*, 6 Robinson, 140. *Guidry v. Grirot*, 19 La. *Beaumont v. Covington*, 2 Rob. 190. *Boatner v. Ventress*, 8 N. S. 653. Upon an analogous principle, this action may be maintained against a trespasser by one who has but a colorable title. *Terrell v. Chambers*, 12 La. 578.

*Lea*, in the words of the law, Gordon's Digest, § 1574, was in the situation of "any person who may apply for the purchase," &c. The payment of the money made the United States holder of the land in trust for *Lea*, the equitable owner. But this is not absolutely, unqualifiedly, and universally true, as the Supreme Court of the United States intimate in the case of *Carroll v. Safford*, 3 Howard, 450-461.

And this brings us to the question of fact in this case. Were the lands referred to subject, by authority of law, to entry and purchase? The law of August 29, 1842, and the plaintiff's action based upon that law, is decisive of this point. The act declares "the United States cannot issue patents therefor." To say that the

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applicants for lands in that district cannot receive titles (patents) from the United States, is equivalent to this, viz: that they have no equitable title to the lands, for he is an equitable owner who "has entered into a valid contract for the purchase of land." 2 Story's Equity, § 790. Legal and equitable titles are co-relative terms; to deny the right to the first is to settle the condition and character of the latter. *Non constat*, that the lands in question have been surveyed and approved as required by law (2 Land Laws, 890)—that they are not within the reservations for french and spanish claims, referred to in the second section, prohibited from being offered by 1 Land Laws, 184. The refusal to grant patents is the best evidence to show that acts of officers were illegal and unauthorized by law. *Pep-per v. Dunlap*, 9 Robinson, 288. The granting a patent is not a matter of caprice: where the laws of the United States authorize it, the patent follows as a matter of course. 2 L. Laws, Opinions, p.—. On the other hand, it is not a mere ministerial act, which the President of the United States is bound to comply with and sign, though aware that thereby he violates his oath to support the constitution and laws. 2 L. Laws, Opinions, p. 26. In the present case, the proceedings of the St. Helena land office are an absolute nullity. Vide analogous case, 2 Land Laws, p. 39, Wirt's opinion.

III. The receipt of the money by the officers of the St. Helena land district, created a trust on their part to hold the same to the use of the party to whom it belonged. The evidence shews that the defendant's money was employed in the entry. The certificates or evidence of payment, come under the head of personalty; they are essentially choses in action. The plaintiff shows no assignment of them; he is without possession and without title.

IV. The subrogation of warranty granted by *Lea*, in his sale of the lands to *Terry*, gave him no title. No contract of sale had intervened between *Lea* and the United States, for the want of authority on the part of the officers of the land district to give consent—the essential element of a sale in behalf of the government. The principal contract not existing, the accessory (warranty) cannot be inferred. *Lea* had no obligation on behalf of the United States to which he could subrogate *Terry*, and the latter acquired nothing thereby. Warranty has a fixed and determined signification under the laws of Louisiana. It is quite distinct from the claim which a *cestui que trust* has upon his trustee for the payment of money. The laws of Louisiana recognize a privilege on behalf of the vendor, but none on behalf of a vendee to pursue trust funds or any other funds, on a failure of consideration or title. Warranty itself, is a personal obligation, and would not pass from the vendee to his vendee, unless by special subrogation. 1 N. S. 352. 6 N. S. 321. *Smith v. Wilson*, 11 Robinson. By parity of reason, the claim against the officers should have been specially transferred, which is not even referred to in plaintiff's title of May 26, 1837. It did not run with the land, with which it had no connection. The subrogation of *Lea*, was an undertaking on his part that the United States would guaranty the title. The plaintiff has his recourse, in case of eviction, against *Lea*, but no claim against this fund. It would be carrying construction to the very verge of the law to say, "*ut res magis valeat quam pereat*," that the subrogation of warranty must be considered as an assignment of the claim. Acts not valid in one form, may have effect if they unite the requisites of some other; but it would be treating form and substance as alike, to say that where a contract fails to take effect on one subject matter, it must, on a principle of compensation, take hold of some other.

V. The acts of the officers of that land district being void, as done without authority and contrary to the dispositions of law, and, so far as the political corporation the of United States are concerned, *res inter alios acta*, the claim thus assigned existed against the officer who received the money. It is clear that no act of an officer of the United States can bind the interests of the public, unless done within the scope of his official duty, and by authority of law. 7 Cranch, 306. No evidence is found in the record of any notice of assignment, without which, as regards defendant, a third person, it is of no effect. L. C. art. 2613. By the payment of the money into the treasury, the United States did not become the debtor. The rule which holds in individual transactions, does not, in consequence of the extent and intricacy of the affairs of the public offices, hold as regards the United States. They are not imputable with the acts, measures, or laches of their agents, nor chargeable with notice, &c. 7 Cranch, 366. They occupy the position of an involuntary stake-holder, ordering, by the act of '42, the

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treasury to be voided of money received without warrant or authority of law. If they could be considered the debtor, the provisions of art. 2613 would not apply to them; that, and the other provisions of the Code, applying to legal obligations that may be enforced by suit. No suit can be instituted against the United States. The possession of the title to this incorporeal debt, (in defendant) is the only mode of transfer.

VI. The sale from *Lea* to *Terry*, if it could be considered as an assignment of the certificates, does not comply with the requirements of the circular of the land office, the lands not being designated by township, range, and section. 2 Land Laws.

VII. The sale from *Lea* to *Terry*, before the parish judge of St. Tammany, but registered in St. Helena, contains the following description. "A certain tract, or parcel of ground, at or near the mouth of Terry's creek, in the parish of St. Helena in this State, containing 700 acres, be the same more or less, which the said seller declares he acquired by purchase from the government of the United States." The registry of this act was no notice, and can have "no effect" against third persons. Act of 1810, p. 596, § 36, *Bullard and Curry*. Act of March 20, 1827, 2 Moreau's Dig. 302, § 2. *Hyde v. Bennett*, 2 Annual, 800. *Jartroux v. Dupeire*, lb. 610. *Lacour v. Currie*, lb. 791. One of the objects of the registry law, is to protect the innocent purchaser from the fraud of the ostensible owner's making a second sale. The registry is made the legal repository of notice. This court has had occasion in the cases cited, and in that of *Shepherd v. O. C. Press Co.*, to administer wholesome admonition upon the necessity of complying strictly with the law of notice so as to charge the interests of third persons. It is obvious that it would be destructive of the policy of the laws relating to registry, to require that defendant should be compelled to have visited and to have ferreted the land office at Greensburg, for the purpose of ascertaining whether lands registered at St. Helena, as conveyed under the description "situated at, or near the mouth of Terry's creek &c.," were the same called for by certificates, having reference not to natural boundaries, but to land surveys, by base, meridian, and sectional lines.

VIII. Independently of all these considerations, the plaintiff cannot recover the certificates, because by leaving those certificates in the possession of *Lea* at and after the time of the alleged sale, he enabled his vendor to act as owner, and thereby prejudice a third party. The principle is well settled by courts of equity, that although the plaintiff may have a right to the assistance of the court to assert his title, yet if the defendant has an equal claim to the protection of a court of equity, the court will not interpose on either side, according to the maxim *In equali jure melior est conditio possidentis*. Mitford Eq. Pleadings, 274. 1 Fonblanque, Equity, B. 1, ch. 4. § 25. 1 Madd. Ch. P's. 170, 171. The case of *Head v. Egerton*, 3 Peere Williams, p. 281, seems to be strictly analogous to the present case. See also *Bernard v. Drought*, 1 Molloy, 38, reported in 16 English Chancery Reports.

*Halsey*, in reply: The defendant claims as owner of the certificates, and cited authority to show that they were assignable. An assignment in express terms is essential. I refer to the authority cited by the defendant. The court referred to art C. C. 2612. "In the transfer of debts, rights or claims to a third person, the delivery takes place between the transferrer and the transferee by the giving of the title." If the certificates are receipts for money paid, they are not the title to the claim for the money. A note is a title, it expresses the obligation to pay; a receipt is not, for the obligation to pay is not expressed in it, but implied. The title is the cause of action; and the title mentioned in the article is the evidence of the cause of action and must express it. The defendant does not own the receipts by mere possession. The plaintiff does not hold them; and though, under the Code, the delivery of them would be essential, it is not under the act of 1842, which gives the claim to the grantee of the land, without requiring the transfer of the certificate. The defendant argued, that *Terry* is in fault for having permitted *Lea* to retain the certificates, and so given him an opportunity, as the possessor, to defraud the defendant. The court has remarked that the defendant did not pay *Lea* for the lands after the plaintiff had purchased them, but had advanced the money long before. *Terry* recorded his title. But if, as the defendant alleges, *Lea* was already insolvent, we cannot presume that he suffered any damage by not suing *Lea* for the money.

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The judgment of the court (*King, J. absent.*) was pronounced by *Rost, J.* On the 19th March, 1836, *Franklin W. Lea* entered certain lands in the parish of St. Helena, at the land office for the Greensburg land district. *Lea* paid for the land, and received from the land office two receipts for the price, numbered 450, 451. On the 26th of May, 1837, *Lea* sold these and other lands to the plaintiff, by an authentic act, which was recorded in the parish of St. Helena, on the 10th of July, 1837, without transferring the receipts, or making any mention of them. In 1842, Congress passed an act, the first section of which provides: "That, in all cases where lands shall have been entered at the land office in the Greensburg, late St. Helena, land district, in the State of Louisiana, where the United States cannot issue patents therefor, owing to the errors and imperfections of the public surveys, or to conflicting claims, it shall be lawful for the person having made such entries, or his or her heirs or legal representatives, or grantees, or their heirs or legal representatives, who may be *legally* and equitably entitled to the same, after a demand of the patent, and a refusal to issue the same, to surrender his or her certificate of purchase to the secretary of the treasury to be cancelled; and, upon such surrender, it shall be the duty of the secretary of the treasury to refund, without interest, the purchase money for such lands to the person entitled to the same, out of any money in the treasury not otherwise appropriated."

In 1844, the plaintiff, considering himself the grantee of *Lea*, applied to the treasury department for the return of the price paid by *Lea*, under this act of Congress. His claim was approved, but, before the money was paid to him, the defendant made opposition, alleging, as he now alleges, that the lands were purchased by *Lea* with his money, and for him. The defendant founds this pretension on a document under private signature, posterior in date to the title of the plaintiff, purporting to be a transfer of these lands from *Lea* to him, in which *Lea* states that he had entered them with the money of the defendant; and upon a receipt signed by *Lea*, and dated 10th March, 1836, for \$900, to be used in entering lands for the defendant. The secretary of the treasury being unable to determine to whom the claim belonged, referred the parties to the State courts. In conformity with this decision, the present action was commenced.

The plaintiff asks the delivery of the receiver's receipts, alleged to be in the defendant's possession, or \$469 37, the value of those receipts. He also claims damages. There was judgment in his favor in the District Court, and the defendant appealed.

We consider it as undeniable that the application of *Lea* for the entry and purchase of the land, which has given rise to this controversy, and the payment of the price by him, would not have divested the United States of the title, even if the land had been subject to entry; and that *Lea* would only have acquired an equitable title, which although sufficient to maintain a petitory action, remained within the discretion of Congress, until a patent issued. *Lefebvre v. Comeau*, 11 La. 321. *Stark v. Orillon*, 13 La. 56. *Guidry v. Woods*, 19 La. 334. *Lott et al. v. Prudhomme et al.* 3 Rob. 141. *Metoyer v. Larenaudière*, 6 Rob. 139. *Wilcox v. Jackson*, 13 Peters 498.

We believe it to be equally true that, if the entry was made without warrant of law, the rights of the public were in no manner affected by it—that no equitable title vested in *Lea*; and the only claim of his grantees, in this case, is for the return of the money paid by him to the receiver, and placed by the latter in the national treasury. *Guidry v. Woods*, 19 La. 339. *Carroll v. Stafford*, 3 Howard 450.

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it was his duty to inquire into the circumstances of the consignee's title and rights. If he had doubts as to those rights, he might probably have been permitted to protect himself by a bill of interpleader, calling upon the plaintiffs, the consignor and consignee to litigate *inter se*. Or he could have refused to deliver the goods, if satisfied upon inquiry that the consignee was a mere agent, and not a consignee for value. But the captain has not thought proper to show that he took any precaution whatever; or even that he has delivered the goods at all. *Non constat*, that they are not still in his possession. At any rate, if he has delivered the goods to the consignee, he has not offered any evidence whatever to show that the consignee was rightfully entitled to receive them, as against the plaintiffs.

Under these circumstances, we think that the case is with the plaintiffs; and that the captain has no right to rely upon the naked fact that, he had signed and issued a bill of lading.

It is said that a bill of lading is a negotiable instrument, and imports a title to the goods in the holder of it. But must this be taken without qualification? A bill of exchange is a negotiable instrument, and the holder is *prima facie* a holder for value. He is not bound to establish that he has given any value for it, until the other party has established the want, or failure, or illegality of the consideration; or that the bill had been lost or stolen before it came into the possession of the holder. It is then incumbent on him to show that he has given value; for, under such circumstances, if he has not given value he ought not to be placed in a better situation than the antecedent parties through whom he obtained the bill. See Story on Bills, § 193.

So in the case of a bill of lading. The plaintiff having established his claim as vendor, the bad faith of the vendee, and a clear right to the vendor's privilege if Churchman's interest had not been divested in favor of Fleming for value given *bonâ fide*, Fleming, in a contest with the plaintiff, would have been driven to show the nature and circumstances of his interest.

By what right can the captain undertake Fleming's case, and claim to stand in a better position? His argument for withholding the goods from the plaintiffs is, that he has signed a written promise to deliver them to Fleming; but, if Fleming was in bad faith, or was a mere agent, he could not have succeeded in doing what the captain insists upon doing for him.

It is very true that the right of stoppage *in transitu*, under the law merchant, which bears, in some respects, a strong analogy to the exercise of the vendor's privilege under our Code, is defeated by the negotiation of the bill of lading. But this rule must be understood with this qualification, that the transferee has received it in good faith and for value.

In *Cumings v. Brown*, Lord Ellenborough said that, if the assignee of the bill of lading knew that the consignee was in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid, in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would be an act done in fraud of the consignor's right to stop *in transitu*, and would therefore be unavailable to the party taking the bill of lading under such circumstances, and for such purpose. He recognized, as the true criterion, that suggested by Mr. Justice Buller—does the purchaser take it fairly and honestly? See also Eden on Bankruptcy, 313 *et seq.* See *Lickbarrow v. Mason*, Smith's Leading Cases, 507. *Cumming v. Brown*, 9 East, 514. *In re Wisbyinthus*, 5 B. and Ad. 817. 3 Kent's Com. 216. Abbott on Shipping, 514 *et seq.*

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The court below gave judgment dismissing Gilchrist's opposition, and a motion was made by him for a new trial, which he accompanied by affidavit that he arrived at the port of New Orleans, on his return from Philadelphia, a few hours after the trial of the cause; that he could prove by a witness at Philadelphia, that he had delivered the flour to *Fleming*, who had received the bill of lading in due course of mail, and accepted bills to the amount of \$3000; that he had not discovered the materiality of this testimony until after his arrival here, and had no representative here who knew the facts. The affidavit referred to a certificate by the proposed witness, who states that he was in the employ of *Fleming*; that the letter enclosing the bill of lading was received in due course of mail, and that *Fleming* accepted drafts for \$3000, drawn against the shipment. The new trial was refused.

We cannot with propriety interfere with the ruling of the court below, nor say that the discretion which the law confers with regard to new trials, was improperly exercised. There was a want of due diligence. The testimony itself was not discovered after the trial. Its materiality the party was bound to know before he went to trial, and he might have asked a continuance. Besides, the affidavit does not disclose enough to make out a defence. It is not stated *when Fleming* made the advances, nor that they were made in good faith and before notice. *Non constat*, that the consignee involved himself before *Gilchrist* arrived at Philadelphia with the goods. It would be a very dangerous precedent to reverse a judgment and remand a cause for new trial on so loose a showing. There may be hardship in this case; but if there be, it must be attributed to the party's want of diligence and caution. We cannot break down well settled and wholesome rules of practice, in order to reach the supposed hardship of a particular case. It is proper also to observe that the third opponent, on his part, has held the plaintiff to strict practice.

It remains only to consider the correctness of the refusal of the District Court to set aside the sequestration.

For the purposes of this inquiry it is necessary to lay out of view the subsequent testimony in this cause, and to look only to the proceedings which preceded the levy of the writ. If the writ improperly issued, it cannot be aided by the proof adduced at the trial on the merits, nor even by the admissions of fact contained in the subsequent pleadings, the observance of the requisites prescribed by law being in the nature of a condition precedent. It is proper to add that there was no implied waiver of irregularities, the rule to set aside having been taken *in limine litis*.

The grounds of the rule were that the affidavit is insufficient, the party not swearing to any specific sum as being due, nor to his apprehension that the property would be removed during the pendency of the suit. The affidavit is in the following words:

"George W. Wilson, one of the firm of *Wilson & Gleason*, merchants, trading and residing in the city of New Orleans, being duly sworn, deposes and says that *Samuel Churchman*, merchant, trading and residing in the city of New Orleans, is justly and truly indebted to the said firm of *Wilson & Gleason* in about the sum of forty-nine hundred and fifty dollars, for this, to wit: On the 6th day of January, 1848, *Wilson & Gleason* sold to the said *Samuel Churchman*, through his broker, about nine hundred barrels of flour, at five dollars and fifty cents per barrel; the said flour so sold has been delivered, and payment for the same has not been made. Wherefore deponent prays, in consideration of lien or privilege, that the said *Wilson & Gleason* have as vendors of the property sold, that a writ of



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sequestration issue, and the said flour so sold be sequestered, as deponent verily believes the said *Churchman* will dispose of the same, or send it out of the jurisdiction of this court."

It will be observed that, the amount sworn to is not a sum certain, and that the necessity of a sequestration for the protection of the parties privilege, is not clearly deducible from the language used. It was correctly said in *Sellick v. Kelly*, 11 Rob. 149, that it is not the mere existence of a privilege that gives the right of sequestering property; there must be also a well founded apprehension that the party will be deprived of its exercise, unless aided by the process of the court. If there is not danger that the property will be removed before the party can have the benefit of his privilege, the writ ought not to issue, and the existence of this danger should appear from the affidavit. We are not prepared to say, that the party should in this particular case, have sworn *totidem verbis*, that he feared the property would be disposed of, or removed, "during the pendency of the suit." Those expressions may not be sacramental under the Code and statutes in this particular case, but the necessity of the conservative process should substantially appear. The affidavit does not say when *Churchman* will dispose of the property, or send it out of the jurisdiction of the court. The affidavit would be consistent with truth, even if, at the time, the plaintiff was convinced that the property would not be disposed of, or sent away, before a judgment could be obtained and a *feri facias* issued. Nor is this uncertainty cured, but, on the contrary, it is increased, by considering the context of the affidavit. *Non constat*, that the price was due, or even if due, that it had never been demanded. The whole showing is loose and uncertain.

Sequestrations and other conservative remedies by which the property of a party is wrested from his possession, and taken into the custody of the law, before judgment, without notice, and upon the *ex parte* showing of the plaintiff, are extraordinary, and rigorous, and hence the doctrine has been uniform, that they are to be strictly construed, and that the requisites of the law must be observed on pain of nullity. *Graham v. Burckhalter*, 2 Annual 415. *Bres v. Booth*, 1 Annual, 308. *Friedlander v. Myers*, 2 Annual, 920. *Sellick v. Riley*, 11 Rob. 158. *Lacey v. Kenley*, 3 La. 18.

As we deem it our duty to set aside the sequestration, and the plaintiffs are thus deprived of a recourse upon the bond, it is necessary to make provision for a personal recourse upon the third opponent, and we shall do so, by remanding the cause for the purpose of ascertaining the value of the flour at the date of the bonding, and for the rendition of a judgment accordingly against the third opponent.

It is therefore decreed that, the judgment dismissing the opposition of *Gilchrist* be affirmed. It is further decreed that, the judgment on the rule to set aside the sequestration be reversed, and that the said sequestration be set aside; the costs of the sequestration, of said rule, and of this appeal, to be paid by the plaintiffs. It is further decreed that, this cause be remanded for the sole purpose of ascertaining the value of the flour sequestered at the date of the bonding thereof by said *Gilchrist*, and of rendering judgment for such value, in favor of said plaintiffs, against said *Gilchrist*, with interest from the date of such bonding and costs, subject to credit for such portion of the price of said flour as the said plaintiffs may have received from *Churchman*.

## HARTWELL v. WALKER.

Where an agent, authorized to purchase grain for his principal, contracts with a third person to take "all the grain he could deliver within a certain time," the contract will not be binding on the principal. *Per Cur:* The agent undertook to bind his principal for the purchase of grain, but the other party did not bind himself to sell any. Principals may make what contracts they choose; but the power to make a contract of this sort cannot be deduced from any general authority.

**A** PPEAL from the Third District Court of New Orleans, *Kennedy, J. Micou*, for the plaintiff. *Grymes, Elmore and King*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** The plaintiff, who resides in Cincinnati, sues the defendant, who is a merchant in the city of New Orleans, for the sum of seven thousand three hundred and twenty nine dollars. The cause of action alleged is, that the plaintiff, in April, 1847, entered into a certain contract or contracts with the defendant, represented by his agents, by which the defendant agreed to purchase from the plaintiff certain large quantities of oats, at the price of fifty and fifty three cents a bushel, beside the charges from Cincinnati, where the contract was made, to New Orleans; that the defendant agreed to pay for said oats in cash on demand, or by the acceptance and payment of drafts drawn on him, for the price thereof, by his said agents. The plaintiff charges that, under his contract he made several shipments of oats to the defendant, which were paid for in cash by his agents in Cincinnati, or by bills on New Orleans; but that, in consequence of the fall in the market value of oats, and for no other reason he, the defendant, refused to receive and pay for certain other shipments made by him, the plaintiff, under the contract; that under an agreement made between him and the defendant, a portion of these shipments were received by the latter, at the current market price, without prejudice to the ulterior claims of the plaintiff; that other shipments arriving the defendant refused absolutely to receive them, and they were sold at auction, after due notice and advertisement, on his account, at a considerable loss. For the deficit on these operations, and the loss, charges and damages incident thereto, this action was brought.

The general issue is pleaded by the defendant, and the plaintiff is expressly charged in the answer, with having combined with one of his agents, for the purpose of defrauding him. The plaintiff had judgment in the District Court for the sum of six thousand two hundred and thirty seven dollars and sixty seven cents, with interest, and the defendant has appealed.

The manner in which the cause has been presented to us by counsel, limits our enquiry to the operations under one single contract, and, if they are excluded from the general account between the parties, the balance will be in favor of the defendant. This contract was made with the plaintiff by *John G. Wasson*, the agent of the defendant, on or about the 19th April, 1847, and we give it in the language of *Wasson*, who was examined as a witness; "The contract was that the witness would take from *Mr. Hartwell* all the oats he could deliver between that date and the 1st of June, 1847, at fifty three cents per bushel, delivered in Cincinnati. In pursuance of this contract of about the 19th of April, the oats were delivered by *Mr. Hartwell* in quantities, and at the rates specified in the accounts marked A."

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The plaintiff recovered in the District Court on the ground that, *Wasson* was the general agent of the defendant, he having been sent to the western country for the purpose of making large purchases of grain and horses, which the defendant was selling for the use of the army in Mexico; and it is contended by the counsel for the plaintiff that this contract was ratified by *Davenport*, the principal agent of the defendant in the west.

Conceding that *Wasson* and *Davenport* had full power from the defendant to contract for the sale and delivery of oats with the plaintiff, it is evident that the contract made by *Wasson* did not secure to the defendant a single bushel of oats. *Wasson* undertook to bind his principal for the purchase of oats, but *Hartwell*, the plaintiff, did not bind himself to sell any. *Hartwell*, by this agreement, had the range of the market, at a time when the article was peculiarly liable to fluctuation in value, for the space of six weeks; if it fell in value, any quantity—all the oats he could deliver—could be put upon the defendant at fifty three cents a bushel; and if it rose, the defendant could have no benefit from the agreement. Principals can make what contracts they choose; but we do not understand, how the power to make a contract of this kind, on the part of an agent, can be deduced from any general authority. Story on Agency, nos. 21, 62, 68. The defendant certainly gave his agents no authority to bind him to this extent.

Under this view of the subject it is unnecessary to enquire whether *Wasson*, in his contracts for oats, exceeded the limits of prices prescribed by the defendant, or to examine the other questions raised by counsel on the argument of the cause.

The judgment of the District Court is therefore reversed, and judgment rendered for the defendant, with costs in both courts.

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#### TERRY v. HENNEN.

An entry, and payment of the price, of a portion of the public lands subject to entry, does not divest the title of the United States; the title is not divested until a patent has been issued. The purchaser acquires only an equitable title, subject to the discretion of Congress; but such a title is sufficient to sustain a petitory action.

The payment of the price of public lands of the United States, entered without warrant of law, can in no manner affect the rights of the government. No equitable title vests in the purchaser, whose only claim is for the return of the money paid by him.

The constitution of the United States vests in Congress the exclusive power to dispose of, and make all needful rules and regulations in relation to, the public lands. The State courts have no authority to interfere with the primary disposal of the soil. That power rests exclusively with the general government, which has from the beginning acted upon it by legislation, through boards of commissioners, receivers, and registers, under the final supervision of the secretary of the treasury; and the decisions of that officer, made within the jurisdiction vested in him, cannot be reviewed by us.

The sale of a thing belonging to another is null.

The rightful owner of receipts, given by the the receiver of public monies, for the price of public lands sold without warrant of law in the Greenburg land district in this State, must be considered as the person meant by the word "*grantee*," in sec. 1 of the act of Congress of the 29th August, 1842, providing for the refunding, under certain circumstances, of money paid for public lands in that district; nor will a sale, by authentic act duly recorded, of the lands, which does not transfer the receipts, or make any mention of them, nor the execution of an act under private signature, purporting to be a transfer of the lands to a person with whose money the transferrer acknowledges in the act that he purchased them, amount to such a transfer of the receipts as will entitle the vendee or the furnisher of money to claim the amount of the receipts from the treasury. *Per Cur*: In the transfer of

debts to a third person, the delivery takes place between the transferrer and the transferee, by the giving of the title. C. C. 2612. The titles in this case are the receipts; and by "*grantee*" the act of 1842 means the owner of them.

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Without an assignment, or proof of actual delivery, the possession of the receipts given by a receiver of public moneys for the price of public lands, will give the holder no better title to them than he would have to a promissory note payable to the order of the purchaser of the lands, held by him without endorsement or proof of transfer and delivery. Art. 2613 C. C. supposes that when the title is not transferable by delivery, and does not bear upon its face evidence of the lawful possession of the holder, proof of the delivery must be made.

**A** PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.*

*Hoffman*, for the plaintiff.

*Halsey*, on the same side. Defendant founds his pretensions on a document purporting to be a transfer of the lands from *Lea* to him, in which *Lea* states that he had entered them with the money of the defendant; and upon a receipt signed by *Lea*, dated March 1836, for \$900, to be used in entering lands for the defendant. The plaintiff objected to the introduction of these documents, on the ground that they were "*acts under private signature, and inadmissible as evidence against the plaintiff.*" As evidence of a sale, the act of transfer was inadmissible. C. C. 2417. As evidence that the lands were entered with defendant's money, and that *Lea* received the sum of \$900 for that purpose, the act of transfer and the receipt would have been inadmissible, had they been authentic acts; as private acts, besides that objection, they were subject to this, that they had no date as against the plaintiff, except from the day of their production in court. The sale to the plaintiff was prior to that to the defendant. It was recorded in July, 1837; that to the defendant was not recorded until 1845. 7 N. S. 662.

The defendant's evidence, if admissible, proves that *Lea* entered the lands in his own name. If he bought them with the defendant's money, and intended them for the defendant, the defendant had perhaps an action against him for a title. But the title was in *Lea*, and he could convey the lands to any one. The plaintiff purchased them, and in good faith. The title is in him, and he is not affected by the equities existing between *Lea* and the defendant. The plaintiff is *Lea's grantee*, and the claim belongs to him. This is the express provision of the act. It is obvious from the proceedings before the department at Washington, that the only question at the time the parties were referred to a court, respected the title to the lands. The department could not determine which of the parties was the *grantee*. The decision of this question is conclusive of the dispute, for the claim does not exist except by the act of 1842, which gives it to the grantee.

But the defendant, knowing that he had no right to the lands, and could not claim the return of their price as *grantee* of *Lea*, alleged that no title passed from the United States to *Lea*, that there was no purchase by the entry, and therefore the payment of the price was a mere deposit of so much money, for which the United States are responsible to him, as owner of the money deposited.

It is certainly not essential that a title should have passed to *Lea* by the entry, and from *Lea* to the plaintiff by the act of sale. The act of 1842 gives the claim to the person who entered the lands, or his *grantee*. The plaintiff and the defendant are both *grantees* in name, but the priority of the plaintiff's purchase gives him an equitable preference to the defendant. Supplement, P.

But the position assumed by the defendant, that no title passed by the entry is untenable. There is nothing in the act to the contrary. Congress authorized the return of the price of lands in the district, not because no sale had been made, but because the surveys were erroneous and imperfect; because the lands were incorrectly located, the actual locations either conflicting with prior claims, or the proper locations so conflicting or differing from those exhibited to the purchasers at the time of entry. There is nothing in the act of 1842, that implies that the lands had not been sold. The implication is rather, that the lands had been sold, and the treasury department have so considered, since they have required in every instance of an application under the act, a certificate that there was no mortgage on the land of the applicant, or conveyance of it from him.

It being certain that the public lands of the district were subject to purchase, the entry by *Lea* at the land office was a purchase from the United States,

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1819, and that the tract of land in controversy was inventoried as his, and adjudicated to his widow.

This testimony is too vague and weak to authorize us to draw from it the conclusion that *Henry* sold his interest to *Robert Badon*, even if it stood unopposed by circumstances strongly tending to repel that inference. No fact is testified to inconsistent with *Henry Badon's* being a part owner of the land at the time when the conversations and acts detailed by the witnesses occurred. There is no distinct admission of a sale; and neither of the witnesses say that the parties ever spoke of a sale having been made. The conversation in relation to the state of the accounts between the parties, is not shown to have had any connection with, or reference to, a sale; and it is quite as probable, from the evidence, that it related to the accounts of *Robert* with his brothers, as their curator, during their minority. If it could be considered as relating to a sale, it is not shown whether the alleged sale was made under the dominion of the spanish laws or subsequently.

As the defendant relied upon a verbal sale, it was incumbent on him to show one made at a time when such transfers were authorized by law.

But independently of the loose and unsatisfactory character of the evidence adduced in support of a verbal title, other facts are disclosed opposed to the presumption of a sale. Although two witnesses state that *Robert* lived upon the land, as owner, from the death of his mother until his own, it is shown by several other witnesses, whose testimony is unimpeached, that *Zenon* also lived upon the land until his death, which occurred in 1815; and that *Henry* likewise lived upon it from the time of his mother's death until 1814, and that he built a house upon it, which he occupied for several years after his marriage, and finally removed to an adjoining tract. His possession must be considered to have been in accordance with his title, no divestiture having been shown. The subsequent uninterrupted possession of *Robert*, and of his widow and heirs, and the omission of the heirs of *Henry* to assert their claim, may well have arisen from the long minority of the latter.

The next ground relied upon is, the prescription of thirty years. This plea cannot avail the defendant. We have seen that *Henry Badon*, the ancestor of the plaintiffs, resided upon the land in controversy until 1814, and in the absence of proof of a divestiture of title, he must be presumed to have possessed as owner. Prescription could only commence at that date, and could not have been completed until 1844. But, in 1839, it was interrupted by the intervention of the plaintiffs in a suit in which the heirs of *Robert Badon* were claiming a partition among themselves of the land in controversy, alleging that it belonged exclusively to them. In that suit the present plaintiffs asserted the same title under which they now claim. See the case reported in 15 La. 455.

The defendant next relies on the adjudication of the land to the widow of *Robert Badon*, as a title on which to base the prescription of ten years against the succession of *Henry Badon*, which he contends was vacant. There is neither averment in the pleadings, nor proof in the record that the succession was vacant, and the fact is not to be presumed. If it was vacant, it must have been susceptible of easy proof, and was indispensable to support the prescription of ten years. It is a fact relied on by the defendant to establish his title, otherwise defective, and the burthen of proof rested upon him. 10 Rob. 52. 1 Greenleaf on Evidence, secs. 58, 71, 72. 2 Ibid, sec. 539.

It is further contended that, more than ten years elapsed from the time that three of the plaintiffs attained the age of majority, until the inception of the

present suit; and that the defendant's title is protected, as far as relates to them, by the prescription of ten years.

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We have seen that the plaintiffs were parties to a suit instituted in 1839, asserting title to the land in controversy. At that time the three plaintiffs referred to had attained the age of majority; but the suit interrupted prescription. The proposition that a suit only interrupts the term of prescription while it lasts, is untenable. In the case of *Baker v. Thomas et al*, 4 La. 418, it was held that, the prescription having been once interrupted, the previous time could never after be computed to acquire a right by prescription.

### MATTER OF THE NEW ORLEANS IMPROVEMENT AND BANKING COMPANY.

The proviso in the statute of 27 March, 1843, amending article 3333 C. C., which declares that that act shall not apply to certain mortgages in favor of the property banks, is not restricted to stock mortgages executed in favor of those banks, nor to those made directly to them, but extends to mortgages which have been acquired by subrogation; and where the subrogation was by authentic act, and recorded where similar contracts are required to be recorded, third persons will be affected by notice without any inscription in the books of the recorder of mortgages. [*On this point, the Court being equally divided, the judgment below was affirmed.*]

The statute of 27 March, 1843, was intended to enlarge the effect of the statute of 11 March, 1842, amending art. 3333 C. C. It does not follow because these statutes are exceptional, that they should be construed strictly. The construction should be such as will advance the object of the legislature. [*On this point, the Court being equally divided, the judgment below was affirmed.*]

Section 19 of the statute of 9th February, 1836, incorporating the New Orleans Improvement and Banking Company, does not exempt from taxation real estate held by the company. The exemption extends only to its capital stock.

The proviso of section 7 of the statute of 20th March, 1840, amending the charter of the city of New Orleans, limiting the privilege conferred by that section to two years, applies only to claims for paving, and not to amounts due for taxes.

The penalty imposed by section 9 of the statute of 9th February, 1836, incorporating the New Orleans Improvement and Banking Company, which declares that if the said company shall, at any time, suspend or refuse payment in lawful money of the United States of any of its notes, bills, or obligations, the holder of any such note, bill, or obligation, or person entitled to demand and receive such money, shall be entitled to receive interest thereon from the time of such suspension or refusal, until fully paid, at the rate of twelve per cent a year, cannot be recovered without a demand of payment of each note, and proof of failure to pay, and then only from the date of such demand and failure. The suspension of specie payments by the bank, will not relieve the holder from the necessity of making such a demand, to entitle him to interest at that rate.

Where an account presented by commissioners appoint to liquidate the affairs of a banking company, has been homologated so far as not opposed, the judgment of homologation will be conclusive against a creditor who made no opposition below. An appeal taken by a creditor under such circumstances cannot be entertained, without an assumption of original jurisdiction by the Supreme Court.

By the statute of 15th March, 1830, section 11, the legal mortgage on real estate in favor of the State for taxes imposed on it, is limited to two years from the time when such tax became due.

**A** PPEAL from the Third District Court of New Orleans, *Strawbridge, J.*, presiding. *Elmore*, Attorney General, for the State. *T. A. Clarke*, for *Corning & Co.* *Marsoudet*, for the Commissioners and for *Alvarez*. *D. N. Hennen, pro se.* *Pilot*, for the Citizens Bank. *W. W. King*, for the General

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Council. *Schmidt, for Justamond.* The judges being equally divided in opinion on some of the points in this case, the judgment of the lower court was, on these points, affirmed, under article 68 of the constitution.

Rost, J. Oppositions were made by several of the creditors of the *Improvement and Banking Company* to the final tableau of distribution filed by the commissioners appointed to liquidate that institution; and the various appeals presented by this record, have been taken from the judgments rendered on those oppositions.

The most important error to which our attention is directed is assigned by *J. Corning & Co.*, who are note holders, and claim to be paid out of the proceeds of the real estate, under a mortgage subscribed in their favor by the bank, in 1842. They allege that the District Court erred in giving the precedence to the mortgage of the Citizens' Bank, on the same property, after it had lost its rank for want of reinscription. The facts material to this part of the case are as follows:

On the 22d of May, 1835, *Dominique Seghers* sold to the Improvement Bank the land on which the St. Louis Hotel stands. A part of the price was paid in cash, and for the balance of \$200,000, it was stipulated that the bank might, within a given time, elect to pay it, or to furnish in satisfaction thereof her bonds to that amount, bearing interest payable in 1850. The bank elected to give bonds, and accordingly, on the 21st of March, 1836, the bonds were executed and secured by an act of mortgage of that date. They were paraphed to identify them with the act, and delivered to *Seghers*. The act of 22d of May, 1835, was duly recorded on the current register of the recorder of mortgages, on the 30th May following. The act of 21st March, 1836, securing by mortgage the bonds referred to, was recorded on the 28th of the same month, not in the current register, and in the order of time, but upon the margin of the record of the act of the 22d of May, 1835. On the 14th April, 1840, *Seghers* sold the bonds to the Citizens' Bank, who took from him a transfer of the bonds and subrogation to the mortgage given to secure them, by notarial act. This act was also presented to the recorder of mortgages for recording, and he did accordingly record a memorandum of it, not in the current register, in the order of time, but on the margin of the record of the act of the 22d of May, 1835, and following the record of the act of the 21st March, 1836.

In 1848 this controversy arose between the Citizens' Bank and the note holders, each contending for a priority in rank, as mortgagees on the property sold by *Seghers*. The note-holders allege that the only valid inscription is that made in the order of its date, in May, 1835; that the subsequent inscriptions having been made in the margin of this, though subsequent in date, cannot affect them, because they are not bound to look more than ten years back from 1845. The Citizens' Bank, on the contrary, maintains that the recording of the act of subrogation of the 14th April, 1840, was a new and a later inscription, by which a new creditor gave notice of his claim; that, under art. 3330 C. C., a creditor is competent to make an inscription of a public act, or of a judgment in his favor, and that no agency of the debtor is required therein. That art. 3356 C. C. requiring mortgages to be recorded in the order of their date, without leaving any intervals between them, is merely directory to the recorder. They further argue that it is unnecessary to enquire into the question of reinscription, because, under the provisions of an act of 1843, amending art. 3333 C. C., no reinscription was necessary. The District Court dismissed this opposition, and recognized the right of mortgage claimed by the Citizens' Bank. The opponents have appealed.

The court being equally divided on this opposition, I will proceed to state the reasons of the opinion I have formed.

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The act relied on by the Citizens' Bank in support of the proposition that no reinscription was necessary, is in these words:

"Be it enacted that art. 3333 of the Civil Code be so amended that, it shall be the duty of the recorder of mortgages, and of judges performing the like duties, to cancel and erase, on the single application in writing to that effect, by the owner, creditor of the owner, or other party interested, all inscriptions of mortgages which have existed or may exist on their record for a period exceeding ten years, without a renewal of such inscription: *provided*, however, that this section shall not apply to mortgages against husbands for the dotal or other claims of their wives, to mortgages against tutors and curators in favor of minors, interdicted or absent persons, *nor to such mortgages in favor of the property banks.*"

The words, *such mortgages*, have not a precise meaning. But in the french text the general description of *hypothèques consenties en faveur des banques hypothécaires*, is made use of.

The appellants argue that, this act must be construed with an act of 1842, which provides that the rules requiring the reinscription of mortgages shall not apply to mortgages which have been or may be given by the stockholders of the various property banks, and that its application should be limited to stock mortgages. That, if it embraces other mortgages, it can only be those given directly to the bank, not those acquired by subrogation, as this has been. That, if it extends to mortgages acquired by subrogation, it is necessary that the subrogation should be duly inscribed in the book of the recorder of mortgages, and that the inscription in this case, in the book of 1835, of a memorandum, defective in form, is insufficient.

There is no reference to the act of 1842 in that of 1843. The latter purports to be a direct amendment of the article of the Code, and the reason and policy which induced the first exception, lead me to the conclusion that it was intended to be enlarged by the second enactment. It does not follow that, because this legislation is exceptional, it should be construed strictly. It is one of the means resorted to by the legislature to secure the State against loss on the bonds issued in favor of the property banks; and when the meaning of their enactments is not free from ambiguity, I consider it my duty to make such construction as will advance the object they had in view. I do not think that the words used in the statute were intended to limit its application either to stock mortgages, or to those given directly to the property banks. It is doing no violence to language to consider all mortgages owned by them as mortgages in their favor, under the statute, without reference to the manner in which they have been acquired.

The subrogation in this case was made by authentic act, and recorded where the law required similar contracts to be recorded; this affected the opponents with notice without any inscription in the books of the recorder of mortgages. It was good against all the world as an alienation. It matters not, therefore, whether the memorandum, inscribed in the office of the recorder of mortgages, was defective as an inscription, or recorded out of its proper place. It was at least notice of the subrogation to the recorder; and, under the provisions of the act of 1843, he could no longer cancel the mortgage.

After the subrogation to the Citizens' Bank, in the manner already stated, this mortgage stood, under the act of 1843, in the same position as mortgages against husbands, tutors and curators.



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That the legislature intended the reserved inscriptions to continue in force, cannot, upon any rule of construction, admit of a doubt. This legislation no more impaired the obligations of the contract between the bank and the holders of its circulation, than all the other exceptional laws passed of late years, in relation to banks, have impaired those obligations. Registry laws are essentially under the control of the legislature, who may at all times dispense with reinscriptions. I am of opinion that no reinscription was necessary, to preserve the rank of the mortgage of the Citizens' Bank.

The Citizens' Bank has appealed, and alleges that it is aggrieved by the following dispositions of the judgment: 1. All those declaring that the property of the Improvement and Banking Company is subject to taxation, the same being exempted by the 19th section of their charter. 2. The one allowing a privilege to municipality No. One, for the whole amount of their claim, while the same, if due at all, is reduced by law to the last two years.

The 19th section of the charter of the Improvement and Banking Company, provides that the capital stock of the company shall be exempt from taxation. The taxes claimed were not levied upon the capital stock. They are taxes on real estate, which the company was of course bound to pay.

We concur with the judge of the District Court that, under the 7th section of the law of 1840 (Sessions Acts, p. 51), the municipality No. One, has a privilege for taxes due them, and that the proviso at the end of the section limiting their privilege to two years, is applicable to the claim for paying only.

The Commissioners of the Improvement and Banking Company have appealed from the following dispositions of the judgment. 1. The one allowing to the Citizens' Bank the sum of \$4,693 32, the amount of rents received since the St. Louis Hotel was seized by the sheriff, under their mortgage. 2. The one allowing interest at the rate of twelve per cent per annum to the holders of the notes, from the suspension of specie payments.

It appears that, after the Improvement and Banking Company had gone into voluntary liquidation, the Citizens' Bank seized the St. Louis Hotel, under the mortgage to which they had been subrogated by *Seghers*. It was understood between the parties that, in order to save costs and to prevent delay, the seizure should be permitted to go on, the legal right of the Improvement Bank to resist the seizure and sale being reserved. During the continuance of the seizure the rents mentioned in the last petition of appeal accrued, and the court allowed them to the Citizens' Bank. The appellants contend that there is error in this part of the judgment: 1. Because the privilege granted to the Citizens' Bank, by the 26th section of its charter, was not applicable to the present case. 2. Because, even if this privilege actually existed, the Citizens' Bank could not avail itself of it, because it had become a party to the *concurso*.

These grounds assume that the Improvement and Banking Company was liquidated as an insolvent concern. The reverse is manifestly true. They gave security to the satisfaction of the board of currency for their deposits and circulation, and remained in possession of their assets as a solvent corporation. Their charter was never declared forfeited by a decree of court. The liquidation, on their part was voluntary, and it was managed exclusively by the stockholders without any participation or interference on the part of the creditors. There was no *concurso*, and the Citizens' Bank had the right to proceed as they have done. The right to the rents is not contested, if the seizure is considered valid.

In the case of *Bartlette v. The New Orleans Canal and Banking Company*, 1 Rob. 543, our predecessors held that, the interest allowed by the charter of a bank, when it suspends specie payments, is not due from the time of the suspension, but only from the day of the demand of payment by the note-holder. We adhere to the decision of the court in that case, and are of opinion that the judgment must be amended, so far as it allows interest on the circulation without a demand.

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Under the views expressed in *Girod v. His Creditors*, 2 Annual, 546, we can take no notice of the appeals of *Duncan N. Hennen* and *P. Alvarez*. Mr. Hennen filed no opposition in the District Court, and the judgment homologating the account, so far as not opposed, is conclusive against him. We could not entertain his appeal without assuming original jurisdiction of the opposition first made by him in this court. *Alvarez* is in the same situation.

The attorney general made opposition, claiming a privilege for the whole amount of the taxes due on the real estate of the company. The judgment having limited the privilege to the taxes of the last two years, he prays that it be amended. Whatever may have been the state of the law before the passage of the act of 1830, it appears to us that the district judge decided correctly, under the provision of that act, limiting the privilege of the State to the taxes of the last two years.

The only appeal which remains to be noticed is that of the General Council, which is taken from the judgment of the District Court, disallowing a privilege for the taxes due them. The opposition originally made was founded upon a judgment obtained against the Improvement Bank, with privilege on the St. Louis Hotel. But the Citizens' Bank was not a party to these proceedings, and the District Court, considering that the laws giving a privilege to the several Municipalities for their taxes, make no provision for those due to the General Council, dismissed the opposition.

It is urged that the tax claimed was imposed by the police jury, who had the power necessary for laying such taxes as they might judge necessary to defray the expenses of the public works of their respective parishes. That these taxes are merely assessments on property, and attached to the property itself, and not to the person who may at the time be the owner, in consequence of which a privilege exists upon the property, although no express law gives it. The case of *Oakey v. Mayor et al.*, 1 La. 15, is cited in support of these views.

We are unable to distinguish the taxes imposed by the General Council from those levied by the Municipalities. They are all of the same nature, and under the settled jurisprudence of this court in matters of privilege, the court below decided correctly.

KING, J. I concur in the opinion read by Mr. Justice Rost, and adopt the reasons which he has assigned.

SLIDELL, J. If this were a contest between ordinary persons, I should have no hesitation in concluding that the mortgages to secure the bonds given to *Seghers* would have been gone as to third persons, for want of reinscription. The policy of the law, requiring inscriptions to be renewed every ten years, and dispensing the public from searching beyond that time, would be defeated by a contrary construction.

I cannot concur in the argument that, the recorder may adopt his own mode of keeping his books; and that, if parties want information, they ought to get his certificate, which he, understanding his own books, will so make as to include all outstanding mortgages. One is not bound to get the recorder's certificate; but

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has a right to go and inspect the books himself. Civil Code, 3363. Act of 1826, p. 62. In making that inspection, the law does not require him to search back more than ten years. I do not wish to be understood as saying that, a mortgage fully inscribed in the book for the year 1840, although the actual date of its inscription was in the year 1841, would be ineffectual *ab initio*, against other mortgagees. Perhaps the inscription, being formal in other respects, would protect the party until the year 1850; but when the mortgage book of 1840, became superannuated by the lapse of ten years, a party searching is not bound to look in that book, so far as ordinary mortgage creditors are concerned. It was expressly said in *Shepherd's* case that, the object of reinscription is to dispense from searching more than ten years back.

If, as was said in the case of *Shepherd*, a reinscription made in January, 1846, in the book of that year was void, because it does not in itself contain a description of the mortgaged property, but merely a reference to the description in an antecedent inscription, in January, 1836, *a fortiori*, a defective reinscription in the book of 1835, upon the margin of an act inscribed in 1835, must be held of no effect in 1848.

The next enquiry is, whether the Citizens' Bank, the subrogee of the mortgage given by the Improvement Bank, stands, *quoad* that mortgage, on the same footing as an ordinary person. In consideration of the interest of the State in the so called property banks, the legislature thought proper to engraft upon the general law, an exception in their favor, by the act of 1842, entitled an act to amend art. 3333 of the Civil Code. By this statute it was enacted that, the article be so amended that, the rule requiring the re-inscription of mortgages at the expiration of ten years from the date of their registry, shall not apply to the mortgages which have been, or may be, given by the Stockholders of the various property banks of this State. It is perfectly obvious that, this act does not cover a mortgage given by the Improvement Bank to *Seghers*.

Is the case aided by the act of 1843, entitled an act to amend article 3333 of the Civil Code? By this statute, authority is given to the recorder of mortgages to cancel inscriptions that have existed for ten years, without a renewal of such inscription; provided, however, that this section shall not apply to mortgages against husbands, for the dotal and other claims of their wives, to mortgages against tutors and curators, in favour of minors, interdicted, or absent persons, nor to such mortgages in favour of the property Banks—*ni aux hypothèques consenties en faveur des Banques hypothécaires*.

Now, here, the dispensation of a general duty, imposed upon every body, and from which the property banks had, under the preëxisting law, been exempted, in the sole case of mortgages given to them by their stockholders, is inferred by way of a negative pregnant. Even admitting that the grant of dispensation may be so inferred, it seems to me that such an inference, establishing an exemption in derogation of common right, should be restricted to the express class of mortgages designated in this proviso—that is to say, mortgages in favour of the property banks—*hypothèques consenties en faveur des Banques hypothécaires*.—The utmost latitude, which, on sound principles of construction, would seem admissible in favor of the property banks, would be to consider this inferential legislation as covering all mortgages given by any mortgagor directly to them; especially when we remember that the act of 1842, which, it is reasonable to presume, was in the contemplation of the legislators of 1843, gave the property banks a dispensation in a much more limited class of cases, to wit, mortgages given to them by stock-holders.

However, it is not now necessary to give an unqualified opinion upon the extent of the exemption, as regards the origin or nature of the mortgage. Another view seems to me conclusive of this case.

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If the exemption from reinscription is to be extended, under the act of 1843, to mortgages not given to the property banks originally, but held by them as subrogees, it is, at any rate clear that, the subrogation should be duly inscribed. The public should be duly informed, that the mortgage has passed into the hands of a favored class of creditors, exempted from the necessity of reinscription. This certainly was not done by inscribing in the book of 1835, in the margin of the original mortgage, a mere memorandum, defective in itself, that *Seghers* had transferred the mortgages of 1835 and 1836 to the Citizen's Bank. Nor can I perceive how the fact of the subrogation being made by a notarial act, relieved the Citizens' Bank from the necessity of recording the subrogation in the mortgage office.

I therefore dissent from the decree rendered in this cause.

**EUSTIS, C. J.** My opinion is that, the act of 1843 does not apply to the case of a mortgage like that under consideration; and, consequently, I concur in the view taken by Mr. Justice Slidell, and dissent from the opinion of the other judges.

**ROST, J.** The court being equally divided, on the opposition of *J. Corning & Co.* to the mortgage claim of the Citizens' Bank, on the ground of want of reinscription of the mortgages, it is ordered that, the judgment of the District Court on that opposition stand affirmed. It is ordered that the judgment on the other oppositions be amended, so as to allow interest at the rate of twelve per cent per annum on the circulation, from the day of the demand of payment, instead of allowing it from the suspension of specie payments. It is ordered that the judgment, as amended, be affirmed, and that the account of distribution be rendered in conformity with the foregoing opinion. It is further ordered that one-half of the costs of the court below be paid by the Improvement Bank, and that the remainder of those costs, and those of this appeal, be paid by the other appellants.

#### SAME CASE—APPLICATION FOR A RE-HEARING.

Section 2 of the statute of 10 March, 1845, conferring a privilege on the several parishes of the State for taxes imposed on property in their respective limits, extends to taxes imposed by the General Council of New Orleans.

**ROST, J.** In this case a re-hearing having been asked by the counsel for the General Council, and the court being of opinion that the General Council, under the act of 1845, is entitled to a privilege for the taxes for the year 1845, and the counsel for the Citizens' Bank consenting to an amendment of the decree so as to allow the amount claimed for taxes for that year, with privilege:

It is ordered by the court that, the decree heretofore rendered be so amended as to allow the sum of three hundred dollars, with privilege to be paid out of the funds coming to the Citizens' Bank, and that the General Council be recognized as ordinary creditors for the balance of their claim, to wit, the sum of twenty-six hundred and twenty dollars and fifty cents, and be paid accordingly. And it is further ordered that the costs of the appeal of the General Council be paid by the Citizens' Bank.

**SLIDELL, J.** I am in favor of opening this case by rehearing, for the reasons expressed in my former opinion.

MATTER OF  
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SAME CASE—RULE BY CORNING et al.

The fact that a judge of the Supreme Court was absent from the bench at the time of the argument of a case, will not disqualify him from taking a part in its decision.

*T. A. Clarke*, for *Corning & Co.*, on suggesting to the court that, on the 18th of April last, the case of the Improvement and Banking Company was argued before three of the judges of the court, the fourth judge being absent, and that two of the judges present at the argument have agreed in reference to the matters in controversy, and that they form a majority of the court which heard the cause; moved, that the Citizens' Bank do show cause why the decree entered on the 6th instant, *supra* p. 477, should not be annulled, and one entered in conformity with the opinions delivered by the two judges who formed a majority of the court which heard the case. After argument, this rule was discharged.

**CASES**  
ARGUED AND DETERMINED  
IN THE  
**SUPREME COURT OF LOUISIANA,**  
AT  
**OPELOUSAS,**  
IN  
**SEPTEMBER, 1849.**

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PRESENT: \*

Hon. GEORGE EUSTIS, *Chief Justice.*

Hon. PIERRE ADOLPHE ROST, }  
Hon. GEORGE ROGERS KING, } *Associate Justices.*

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**SUCCESSION OF FOSTER.**

The homologation of a tableau of distribution presented by the widow and administratrix of the succession of a deceased husband, recognizing a mortgage of a third person upon certain slaves belonging to the succession, and ordering its payment, is conclusive against her right subsequently to claim a legal mortgage on the same property to the exclusion of such third person.

Where no neglect or maladministration is alleged, and there is no prayer that the administratrix be held liable beyond the fund acknowledged or shown to be in her hands, the mere fact that the assets in her hands, at the time of the homologation of the first tableau of distribution, and which were ordered to be applied to the payment of a mortgage claim, were sufficient at that time to pay it, will not authorize, in an opposition by the mortgage creditor to the second tableau, a judgment against the administratrix, individually, for the amount of the claim, with the interest accrued since the homologation of the first tableau. Money paid by an administratrix to a creditor of a succession, out of the proceeds of property subject to a previous mortgage, cannot be recovered back by the administratrix, where, at the time of the payment, there were funds in her hands proceeding from the sale of the mortgaged property sufficient to extinguish it, though, by the *laches* of the administratrix in suffering the mortgage claim to remain unpaid and from the accumulation of interest, the fund has become insufficient to extinguish it. She cannot avail herself of her own *laches* to recover money lawfully paid.

**A** PPEAL from the District Court of St. Mary, *Voorhies, J. W. B. Lewis,* for the appellant. *Maskell,* for *Hillyer* and *Robbins.* *Splane,* for the heirs of *Thomas Foster.* The judgment of the court was pronounced by

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\* SLIDELL, J. was not present during this term.

**SUCCESSION OF FOSTER.** ROST, J. In 1835, the widow and administratrix of *Levi Foster*, whose succession was insolvent, filed a tableau of classification, upon which *Hillyer* and *Robbins* were placed as mortgage creditors upon certain slaves of the succession, therein named, for the sum of \$3,666, with interest at the rate of ten per cent per annum from the 22d of October, 1831, until paid; this debt being liquidated by a judgment of the Supreme Court. The decree homologating the classification authorized the administratrix to make payments in conformity therewith, as funds came into her hands. She subsequently made various payments on this claim, by which it was reduced to 2,709 dollars and 48 cents, with interest at ten per cent from the 25th of October, 1843. In 1845, the administratrix filed in court a second and final tableau, showing the payments made by her, and the assets in her hands. In this tableau the proceeds of the sale of the slaves mortgaged, to *Hillyer* and *Robbins*, and the interest received on those proceeds from the purchasers, are stated to amount to the sum of \$6,461. The claim of *Hillyer* and *Robbins* is represented as amounting to the sum of \$5,477 61, upon which payments had been made to the amount of \$4,863, 51. The tableau further shows that the administratrix has paid to the heirs of *Thomas Foster* \$1009 38, under a judgment which decreed to them the balance of the proceeds of the slaves mortgaged to *Hillyer* and *Robbins*, after satisfying the claim of the latter. The tableau represents the sum coming to *Hillyer* and *Robbins* as being only \$596 72. These creditors have made opposition, on the ground that, the tableau, so far as it concerns them, is erroneous; they ask that the administratrix be held to strict proof of the payments made by her; that the tableau be amended; and that they be placed thereon, as they were on the first tableau, and allowed the sum and interest which they claim.

The heirs of *Thomas Foster* also made opposition, on the ground that they are privileged creditors, and have a tacit mortgage on the property of the succession for \$10,000, and that they are not placed on the tableau as such. The administratrix answered this opposition, and claimed, in reconvention, the sum of \$1009 38, alleged by her to have been paid in error to these parties.

The opposition of *Hillyer* and *Robbins* was sustained for the whole amount of their claim; and judgment was rendered against the administratrix, in favor of the heirs of *Thomas Foster*, for \$120, with interest at ten per cent from the date of the last payment made to them.

The administratrix has appealed. The sum now due to *Hillyer* and *Robbins* is correctly stated by their counsel, and they are entitled to the interest allowed by the judgment under which they claim.

The administratrix has applied one-third only of the price of the slave, *Hamilton*, to the payment of their claim, and has retained the remaining two-thirds under her legal mortgage. This she has no right to do. The judgment on the first tableau is conclusive against her. The real amount in her hands is \$7,084 47. She has made payments to the amount of \$4,863 51, leaving a balance of \$2,221 16, which *Hillyer* and *Robbins* are entitled to receive. The payments made to the heirs of *Thomas Foster* cannot prejudice them, the judgment of the court being that their mortgage be first satisfied.

The District Court held that, as the assets in the hands of the administratrix when the tableau of classification was homologated, were sufficient to pay the entire claim of *Hillyer* and *Robbins*, she was bound to pay that sum, with the additional interest which has since accrued.

We are of opinion that the pleadings do not authorize that conclusion. No neglect or maladministration is alleged in the opposition; and there is no prayer that the administratrix be held liable beyond the fund acknowledged or shown to be in her hands. That opposition cannot, therefore, be extended beyond that fund.

NO SUCCESSION OF  
FOSTER.

The heirs of *Thomas Foster* have not made out their claim, nor does their opposition contain any allegation under which the administratrix can be made personally liable; but we are of opinion that the payments made to these parties were not made in error; after they took place, the fund remaining in the hands of the administratrix was sufficient to pay the entire claim of *Hillyer* and *Robbins*. These payments, therefore, were lawful when they were made; and if, through the subsequent neglect of the administratrix, this claim has been increased by the accumulation of interest, and the fund remaining is no longer sufficient to satisfy it, she cannot be permitted to avail herself of her own laches, for the purpose of recovering money lawfully paid.

It is, therefore, ordered that the judgment in this case be reversed. It is ordered that, the tableau be amended, in conformity with the foregoing opinion; and that *Hillyer* and *Robbins* receive from the administratrix, out of the proceeds of the slaves mortgaged to them, the sum of \$2,221 16. It is ordered that the costs of the District Court on this opposition be paid by the administratrix, and those of this appeal by the opposing creditors.

It is further ordered that the opposition of the heirs of *Thomas Foster* be dismissed, with costs, and that the claim of the administratrix against them in re-convention be disallowed.

### FAY V. CHAMBERS.

A confirmation, by commissioners appointed to ascertain the rights of persons to lands, of a claim for a specified number of acres between certain boundaries, being a complete grant from the United States, cannot be affected by any errors committed by officers of the government, in surveying and locating the claim.

**A** PPEAL from the District Court of St. Mary, *Overton, J. Olivier*, for the plaintiff. *Splane*, for the appellant. The judgment of the Court was pronounced by

KING, J. This is a petitory action, in which the plaintiff alleges that he is the owner of a tract of land, measuring eight and one-third arpents, more or less, front, on both sides of the bayou Têche, by forty in depth, upon which the defendant has entered, and committed various acts of trespass and waste. He prays to be decreed to be the owner of the land described in his petition, and for damages. The defendant sets up title to all the land in his possession, acquired by purchase from the United States. A judgment was rendered in favour of the plaintiff for the lands, leaving the question of damages open; and the defendant has appealed.

The plaintiff exhibits as his title: 1st. A *réquete* of *Hilaire Boutté*, junior, for six arpents front, more or less, on both sides of the Têche, upon which there is an order of survey for the six arpents prayed for. 2dly. The confirmation of this claim as "a tract of land containing four hundred and eighty superficial arpents, equal to four hundred and six and 21-100 american acres, founded



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on an order of survey, in favour of *Hilaire Boutté*, for six arpents in front by forty arpents in depth, on both sides of the river Têche," "betwixt the boundaries of *Mr. Boudreau* and that of *Mr. Sorrel*." 3dly. A complete chain of mesne conveyances from *Boutté* to himself.

A survey of the township, in which the land is situated, was made by a United States' surveyor, who located the title of the plaintiff on the western side of the Têche, as a claim for only six arpents in front by forty in depth. In 1848, the defendant purchased from the government 101 62-100 acres of the land on the east side of the bayou, which, it is contended, belongs to the *Hilaire Boutté* title, and which forms the matter of controversy in this suit.

It is clear that, the officers of the government fell into error in locating the *Boutté* title, which has been laid on but one side of the stream, and has assigned to it but six arpents front by forty in depth, being only one-half of the quantity for which it was confirmed. The confirmation was a complete grant, from the government, of a specified number of acres, on both sides of the bayou, between certain named boundaries, which the officers have no authority to reduce; and no action of theirs can divest the plaintiff of his title, or impair his right of ownership.

The only contest relates to the land on the east side of the river. On that side, the plaintiff was entitled to six arpents front, by forty in depth, if that quantity could be obtained. It appears, however, from surveys, that the lines of this tract, at a short distance from the front, come in conflict with the claim of *Jacques Sorrel*, which, it is conceded, is older and superior to that of *Boutté*, leaving on that side but one hundred and one and 62-100 acres applicable to the latter. For that quantity the district judge, no doubt, intended to render judgment. The decree, however, may be susceptible of a different construction; and, with the view of removing future sources of litigation, we will change its phraseology, without altering, as we conceive, its substance, so that it will read as follows:

"It is decreed, that the plaintiff be the owner of the land in controversy, consisting of one hundred and one 62-100 acres, having a front of six arpents, on the east side of the bayou Têche, lying between the side lines shaded in pink, extended back until they intersect the lines of the claim of *Jacques Sorrel*, as represented on the plat of survey, made by *A. S. Fields* under the order of court on file in the cause, and marked no. 11; and that the plaintiff be quieted in his possession of the same. It is further decreed, that the question of damages be left open." Thus construed, the judgment appealed from is affirmed, with costs.

### LEDoux et al. v. SMITH.

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Though a writ of provisional seizure was illegally issued, and the illegality was alleged in the answer, yet, if no application was made to the court below to quash the proceedings under the writ, and there was no action of the court upon it, the illegality cannot be considered on appeal.

**A** PPEAL from the District Court of St. Mary, *Overton, J. Olivier*, for the plaintiffs. *Splane*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** This is an action to recover the amount of certain advances for supplies to the defendant's plantation, made in the year 1844. The plaintiffs took

out a writ of provisional seizure, under which a quantity of sugar, forming part of the crop of that year, on which the plaintiffs claimed a privilege by virtue of the act of 1843, amendatory of article 3184 of the Code, was seized. The plaintiffs had judgment for the amount of their debt and interest, giving them also the privilege claimed by them on the sugar provisionally seized, or the proceeds thereof, and directing the sheriff to pay over the same to the plaintiffs, in satisfaction of the debt, interest and costs. The defendant has appealed.

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We think the debt is established by sufficient evidence, and that it bears a privilege, under the proper construction of the act of 1843 and article 3184 of the Code. *Welsh v. Barrow*, 3 An. 133. *Farrar v. Rowley*, 3 An. 276.

It is argued that the plaintiffs had no right to the writ of provisional seizure, in the authority of the case of *Smith v. Smith*, 2 An. R. 448. No application was made in the court below to quash the proceedings under the writ; and, although the objection to the issuing of the writ was contained in the defendant's answer, no action of the court was had upon it; and we are not at liberty to consider the subject on the appeal.

The sugar was seized by the sheriff, on the 7th day of February 1845, and, on the fourth day of April ensuing a bond appears to have been executed by the defendant, with *Henry C. Dwight* as his surety, the condition of which was, to deliver the sugar to the sheriff whenever called upon to pay the amount adjudged to be due by the defendant to the plaintiffs, by privilege, as obtained by them. The sheriff held 150 hogheads of sugar under several writs against *Smith*, and, it seems, the day after the execution of this bond, it was sold under an execution issued by the Union Bank, and *Dwight* became the purchaser. Of this lot that part effected by the plaintiffs's seizure, formed a part. The sale was for cash, and, as the defendant is the sole appellant, we can perceive no objection to the judgment of the District Court as it now stands.

*Judgment affirmed.*

### LOUISIANA STATE BANK V. DUMARTRAIT et al.

Where the death of an endorser is known, notice of protest, put into the post-office, addressed to the deceased, is insufficient; the notice should have been addressed to his executor. But, if the notice reached, or came to the knowledge of, the executor, notwithstanding its defective address, the succession would not be discharged. So a notice, under such circumstances, addressed to the deceased, if served on the executor, at his dwelling, is sufficient. Under the statute of 13th March, 1827, s. 1, the certificate of a notary that, a written notice of protest was served at the domicile of the endorser, in a village named in the certificate, is sufficient, though it do not state the person on whom the service was made.

**A** PPEAL from the District Court of St. Martin, *Voorhies, J.*  
*Magill*, for the plaintiffs.

*Siman*, for the appellants. The endorser was dead, and the notary knew it, since he served the notice at the domicile of the executor. Why then did he not address the notice to the executor himself, instead of addressing it to a dead man? The general rule is that, if the party be dead, notice should be given to his executor or administrator. *Chitty on Bills*, pp. 242 and 222. Notice should be addressed to the executor or administrator, and not to the deceased, when, as in this case, the holder of the note knows the name of such executor or administrator.

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But, it will be said that, the notice was served at the domicil of the executor. It is true, the certificate says so; but is that sufficient to indicate that the executor got it? Served at the domicil! With whom was it left? and in what manner was it served? For aught that appears, it may have been handed over to a slave, and that would be bad. It may have been thrown in the yard, and there left, or picked up by a servant, or by a stranger. There is nothing certain as to the question whether it reached the executor, and the certificate should shew, at least, such facts as would enable the court to conclude that the party entitled to notice, must have received it in due time. Why was not the notary, or his witnesses, who accompanied him, called to prove the manner in which the service had been made at the domicil of the executors? Why did the plaintiff limit his evidence as to such service, to what is recited in the certificate? Undoubtedly because said service was defective, and would have been shewn to be so. I am aware that, in divers cases, the Supreme Court has decided that, a notice left with a clerk in a store, or with a partner in the counting-room of a commercial house, or with a white servant in the endorser's house, or put on the counter in the endorser's store, or with a student in a lawyer's office, was sufficient; but those cases are quite different from this. The manner in which the notice was served presented to the mind a fact, from which it was properly presumed that the notice reached the party. It has been also decided that, a notice left with a slave, is bad, 9 La., 334; and that a notice, stated in the notary's certificate to have been sent by an express, without naming him, is insufficient. *Duralde v. Guidry*, 5 N. S. 65. The word *domicil*, as we understand it under our laws, is too loose, for the purpose intended. It does not mean only the house in which the party lives, but according to the 42d article of the Civil Code, "the domicil of each citizen is in the parish wherein his principal establishment is selected." The word *domicil* is clearly insufficient to indicate where the notice was left.

The judgment of the court was pronounced by

EUSTIS, C. J. This is an action on a promissory note, against the executors of the endorser, and the only point that has been raised by counsel is, as to the sufficiency of the notice to the defendant, *Pierre Gary*, one of the executors of the late *Louis Gary*.

The certificate of the notary states that, the notice was served, by means of a written notice addressed to the endorser, *L. Gary*, and served at the domicil of *P. Gary*, testamentary executor of *L. Gary*, at St. Martinsville.

There are two objections raised to the validity of the notice, thus certified to have been given. The first is, that the address was wrong, and that it ought to have been to the executor, and not to the deceased. Had the notice been put in the post-office, with this address, the succession of the deceased endorser would not have been bound by it, his death having been known at the time, according to the case of the *Cayuga Bank v. Burnett*, 5 Hill's Rep. 238. But, if the notice reached, or came to the knowledge of, the executor, notwithstanding the defective direction, it seems to us clear that the succession would not be discharged for want of notice.

The notice was served at the domicil of the executor, in St. Martinsville; and the second objection is, that the certificate is defective, and does not establish that a valid notice was given, because it does not state the manner in which the service was made, nor with whom the paper was left; and that the word *domicil* is too loose and indefinite, to fix the place at which the service was made.

The act of 1827, by which the certificates of notaries were made evidence against endorsers of the service of notices of protest, has been frequently the subject of adjudication, in cases arising under it; and the decisions of our courts, on the duties of notaries, under the act, have been followed by them as rules of conduct. We think these decisions conclusive on the point raised in this case. On the authority of the cases quoted by counsel—and, we believe, that there are some recent decisions to the same effect—we think the certificate of the notary is sufficient, without stating the person on whom the service was made. *Franklin v. Verbois*, 6 La. 731. *Commercial Bank v. Gove*, 15 Ib., 114. *Bank of Louisiana, v. Mansker*, Ib. 115, we think the word *domicil*, in the connection in which it stands in the certificate, to wit, the domicile of *P. Gary*, in *St. Martinsville*, is sufficiently definite. It means, in common parlance, his habitual residence in that village; and, whether taken in its popular, or strictly legal sense, a notice of protest served there, is well served.

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*Judgment affirmed.*

### PATOUT, Administratrix v. RAWLS.

Where there is sufficient time between the date and the return day of a citation, the fact that the return day was not during any regular term of the court, is immaterial.

**A** PPEAL from District Court of St. Mary, *Voorhies, J. Olivier*, for the plaintiff. *Dwight*, for the appellant. The judgment of the court was pronounced by

ROST, J. This suit is brought to recover a mortgage debt of \$1,279. The defence is that, the defendant has been released from the payment of the claim. The defendant excepted that he had not been served with a copy of the citation, and that he was cited to appear on the third monday of February, which is not a regular term of the court. These exceptions were overruled, and judgment rendered in favor of the plaintiff. The defendant appealed.

There is no error in this judgment. The defendant was properly cited, and, as there was sufficient time between the date of the citation and the return day, it is not material that that day was not a regular term of the court.

On the merits, we are bound to give legal effect to contracts, according to the true intent of all the parties to them. C. C. 1940 *Kilgore* and the defendant were partners, and owed the plaintiff the sum of \$7,057, secured by mortgage. The partnership was dissolved; and *Kilgore*, receiving in his share of the assets the largest portion of the property mortgaged, assumed the payment of \$5,777 65, being the sum claimed, which the defendant, in the same act, acknowledges to be due by him individually, and which he binds himself to pay the plaintiff. Subsequently *Kilgore* gave *Patout* an additional mortgage on other property, to secure the sum he had assumed to pay; in consideration of which, *Patout* discharged the defendant from all further liability for that sum.

The defendant's counsel contends that this discharge was for the entire debt; but it is manifest that *Patout* did not intend to give such a discharge, nor do we think that the act would, under any circumstances, authorize that interpretation.

*Judgment affirmed.*

## KEMPER et al. v. SPLANE et al.

No action can be instituted against the surety on an administrator's bond, until the necessary steps have been taken to enforce payment from the principal. Stat. 16 March, 1842, sec. 6.

Where a judgment has been rendered in an action against an administrator, removing him from office and ordering him to render an account, the institution of an action, by the heirs, against him on his bond for the amount of their inheritance, is not inconsistent with the previous action; but proceedings should be suspended until the administrator has rendered the account ordered in the first action, or until the delay allowed to him for that purpose has expired. The settlement of the account ordered would form the basis of a judgment in the second action. But where, in such a case, the plaintiff proceeds to trial, his action must be dismissed.

**A**PPEAL from the District Court of St. Mary, *Voorhies, J. Gibbons and Dwight*, for the appellants. *Maskell*, for the defendants. The judgment of the court was pronounced by

KING, J. The plaintiffs, who are heirs of the late *Nancy Kemper*, deceased, have instituted this action against the defendant, *Splane*, who is the administrator of her succession, and *Sparks*, the surety on his bond, claiming the amount of their respective inheritances from their mother. They allege that the administrator has received the proceeds of the property sold, which he retains, and that he declines rendering a final account, and takes no steps to bring his administration to a close.

Various exceptions were pleaded by the administrators, which, having been overruled, the defendants answered that, in a suit then pending in the same court, the administrator had been required to file an account of his administration, and, until the rendition of that account, the filing of which had been delayed from no fault of the administrator, no action on the bond could be maintained. This ground was sustained by the district judge, who also held that, under the act of 1842, no action could be instituted against the surety on the bond, until the necessary steps had been taken against the principal, to enforce payment. The suit was dismissed, and the plaintiffs have appealed.

The judge did not, in our opinion, err. As regards the surety, the act of 1842 is imperative, that the necessary steps must be taken to coerce payment from the principal, before proceeding against the surety on an administrator's bond. See Acts of 1842, p. 303, § 6.

It appears that a suit had previously been instituted against the administrator to render an account and to remove him from office, in which a judgment had been rendered, at the same term of the court at which the present judgment was rendered, dismissing him from his trust, requiring him to render an account of his administration, and to pay ten per cent interest on the amount of the succession funds in his hands, from which the administrator appealed.

The two actions were not inconsistent; but we think that further proceedings should have been suspended in this suit, until the administrator had rendered the account ordered in the previous decree, or until the delay allowed to him for that purpose had expired. The settlement of the account ordered would then have formed the basis of a judgment in this action. To have proceeded in the present suit, to determine the amount of the indebtedness to each heir, would have

been to settle the succession of the deceased, and to render useless that part of the previous decree which ordered the administrator to account. The plaintiffs, however, having proceeded to trial, no alternative was left but to dismiss their action.

KEMPER  
v.  
SPLANE.

*Judgment affirmed.*

### GAUTIER v. BRIAULT.

Simulation, as between the parties to an authentic act, cannot be proved by parol.

**A**PPPEAL from the District Court of Lafayette, *Overton, J.*  
*Mouton and Magill*, for the plaintiff. Fraud may be proved by any species of evidence. C. C. 1842, 1875. 2 An. 458, 908. 4. La. 351. Greenleaf on Ev. 55, 248, 284. 2 Story's Equity, § 1531.

*Crow and Greig*, for the appellant. The act cannot be contradicted by parol. C. C. 2256. 11 Mart. 630. 5 N. S. 250. 6 N. S. 206. 3 La. 460. 4 La. 169. 9 La. 566. 5 Rob. 116. 1 An. 108. The act could be cancelled only on the production of a counter letter. 8 N. S. 448. 3 R. 452. 6 R. 447.

The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff, in an authentic act, acknowledged himself to be indebted to the defendant in the sum of four thousand dollars, which he promised to pay as soon as he was able; and to secure the payment of the sum and interest he mortgaged certain property, described in the act, to the defendant, who was a party to the act and signed it. The present suit is to annul that act, on the ground that there was no consideration for the acknowledgment of the debt, and that no debt whatever, either at the time or since, was due by the plaintiff to the defendant, and that the act was passed out of friendship solely for the defendant and to aid him in his business. The plaintiff had judgment, and the defendant has appealed.

A bill of exceptions, taken by the defendant at the trial, presents the question, whether the alleged simulation of the act can be proved by witnesses. The authorities cited by the counsel show that, it is a settled rule of our jurisprudence that, a simulation, as between the parties to an authentic act, cannot be proved by parol. *Delahoussaye v. Davis*, 19 La. 411.

By the plaintiff's own allegations there was no fraud in the inception of the act, and the subsequent intent of the defendant to avail himself of its provisions, and exact the sum acknowledged to be due by the plaintiff, does not authorize the admission of parol evidence as to the cause or consideration of the act.

The case is, therefore, remanded to the District Court, with instructions to the judge to refrain from receiving the evidence of witnesses against the tenor of the authentic act; and it is ordered that the appellant pay the costs of this appeal.

### DWIGHT, Curator, v. ALLEN et. al.

The appeal must be dismissed, where the certificate of the clerk merely states that, "the record contains all the papers on file in the suit." C. P., 896.

DWIGHT  
v.  
ALLEN.

**A**PPEAL from the District Court of St. Martin. *Voorhies, J. I. E. More and Nicholls*, for the appellant. *Magill and Maskell*, for the defendants. The judgment of the court was pronounced by

KING, J. The motion made to dismiss this appeal, on the ground that the clerk of the District Court has not certified that the record contains all the testimony adduced on the trial, must prevail. The certificate of the clerk is that, "the record contains all the papers on file in the suit of *William C. Dwight, Curator &c v. W. P. Allen and David Bell*." This certificate is clearly insufficient. C. P, art. 896. 2 An. Rep. 11. We find in the record no statement of facts nor bill of exceptions.

*Appeal dismissed.*

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### SUCCESSION OF GUIDRY.

A promise to pay a debt due by a deceased husband, made by the wife subsequently to his death, when the marital authority had ceased, is binding on the wife.

**A**PPEAL from the District Court of St. Martin, *Voorhies, J. Magill*, for the administrator, appellant. *Simon*, contra. The judgment of the court was pronounced by.

KING, J. The administrator of the succession of *Aspasie Guidry*, deceased, presented a tableau of distribution of the funds in his hands, which was opposed by *Cohanin*, and by *Follain, Bellocq and Degelos*, who claimed to be creditors of the deceased, and complain that the administrator refused to recognize them as creditors. Their oppositions were sustained, and the administrator has appealed.

The claim of *Follain, Bellocq and Degelos*, is fully sustained by the evidence. The deceased repeatedly admitted the correctness of the demand, and that she was liable to pay it, and that the debt was contracted for supplies of various kinds which were necessary for her household and for her plantation. At the time that this debt occurred, the deceased was separated in property from her husband, who possessed no means for the support of his family. The proof of the separation, it is true, was made by parol; but it was admitted without objection.

The claim of *Cohanin* is shown to have been one due by the husband of the deceased, which the deceased frequently promised to pay. She finally gave a draft for its amount, which was not paid. The promise to pay this debt having been made subsequent to the death of her husband, when the marital authority had ceased, the judge did not, in our opinion, err in enforcing the obligation.

*Judgment affirmed.*

### FONTENOT V. FONTENOT.

An action against a tutor for neglecting to collect a debt due to the minor, is prescribed by four years, from the majority of the latter. C. C. 356.

**A**PPEAL from the District Court of St. Landry, *Overton, J. Lataste*, for the appellant. *W. B. Lewis*, for the defendant. The judgment of the court was pronounced by

ROST, J. The plaintiff sues the legal representatives of his tutor, for a sum of money, which, he alleges, the latter had made himself liable to pay. The defence is a plea of prescription, under article 356 of the Code. That plea was sustained in the court below, and the plaintiff appealed.

FONTENOT  
v.  
FONTENOT.

It appears, that *Don Diego Lafleur*, the ancestor of the defendant, was appointed tutor of the plaintiff, in place of *Clemence Richard*, the natural tutrix, who lost the tutorship, by contracting a second marriage, without having been authorized to retain it. *Clemence Richard* and her husband had acknowledged in writing, that they had received \$1,494, inherited by the minor from his father.

After the appointment of *Lafleur*, *Clemence Richard* transferred to him, a claim against *Jean Marie Debaillon*, for \$1,386 27, bearing ten per cent interest, which *Lafleur* bound himself to apply, when collected, to the payment, so far as the sum would go, of the sum due by her as tutrix. *Lafleur* obtained a judgment upon this claim; but, before it was satisfied, *Debaillon* died insolvent; and there is no proof that any portion of it has been paid. It is not pretended that the balance due by *Clemence Richard* has ever been paid to *Lafleur*. We cannot distinguish this case from that of *Offutt v. Collins*, 11 Rob. 491. "The neglect of the tutor to collect those debts of his ward, was, in the language of the law, one of the acts of the tutorship, respecting which he should have brought his action within four years after he became of age." The plea of prescription must prevail.

*Judgment affirmed.*

### EDMONDS v. HER HUSBAND.

Where the petition in an action for separation *a mensa et thoro* contains no prayer for a partition of the property of the community, and the defendant has had no notice of an application for that purpose, a separation of property cannot be decreed at the time of rendering judgment for a separation.

APPEAL from the District Court of St. Landry, *Overton, J. Swayze and Taylor*, for the plaintiff. *Martin and Linton*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiff sued her husband for a separation from bed and board, on the ground that he kept his concubine in the common dwelling. The defendant has pleaded abandonment and adultery on the part of his wife, and prays that he may be divorced from her. He has appealed from the judgment rendered against him; and the plaintiff asks that it be amended, so as to decree a dissolution of the community and a partition of the property composing it.

The allegations of the petition are fully sustained by the evidence. The defendant introduced witnesses to prove adultery on the part of the plaintiff; but the judge of the District Court informs us that he attached no weight whatever to their testimony.

We have neither means nor inclination to differ from our learned brother, in a matter of this kind. The virtuous indignation which he cannot conceal in redressing the wrongs of a poor colored woman, shows a proper sense of his duties as a guardian of public morals.



EDMONDS  
v.  
HUSBAND.

A separation from bed and board carries with it a separation of goods and effects; but as the petition contains no prayer for a partition of those effects, and the defendant has had no notice of this application, we think it was properly rejected by the district judge.

*Judgment affirmed.*

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### DWIGHT, Syndic, v. SIMON et al.

Where a *cessio bonorum* has been accepted by the court and the creditors, and a *syndic* been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee. *Stats.* 20 Feb. 1817; 29 March, 1826.

All the rights of an insolvent vest in his syndic, whether placed on his schedule or not.

The rights vested in the creditors by a *cessio bonorum* are unaffected by subsequent proceedings of the insolvent, in causing himself to be declared a bankrupt, under the act of Congress of 19 August, 1841. *Per Cur:* Nothing passes to the assignee of the bankrupt, but the residuary interest of the insolvent after the full administration of the insolvent estate, and the entire fulfilment of the trust thereby created in favor of the creditors.

The appointment of an administrator, regularly made, will not be rendered void by the subsequent discovery of a testament; nor does the authority of the administrator cease from the moment of the probate and order of execution of the will. His capacity to prosecute an existing suit will not cease, even after the executor named in the will has been duly qualified, where the latter, after praying for an inventory, takes no further steps in the administration, and does nothing whatever to indicate that he takes any interest in the prosecution of an action in which the interests of the succession are seriously involved.

The capacity to exercise the office of administrator, does not cease, *ipso facto*, by the bankruptcy of the individual. It may be a ground for his removal; but, of itself, does not impair his official authority.

The exception of *res judicata* must be specially pleaded.

Where a partner charged with the settlement of the partnership employs an agent to act for the benefit and in the business of the partnership, and the latter, even by the express direction of that partner, applies the money of the partnership in his hands to the payment of the individual debts of that partner, or otherwise to his use, he violates his duty as the agent of the partnership, and will be liable to its creditors. Had he delivered the money to the liquidating partner, he would not be answerable for its subsequent appropriation by the latter to his own use.

An attorney at law should not be held to a less onerous responsibility than an attorney in fact; and he will be bound to pay interest on any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over. *C. C.* 2984.

Attorneys and counsellors at law practising in partnership are equally responsible to their clients for money collected and not paid over, though one of them may have had no participation in that particular transaction.

**A** PPEAL from the District Court of St. Mary, *Overton, J.* *Dwight*, appellant, *pro se.* *Maskell*, one of the defendants, *pro se.* *Magill* appeared on the same side. The opinion of the court, read at this term, was prepared at the last term by

SLIDELL, J. *P. H. Robert* and *B. C. Robert* were associated in a commercial partnership in the parish of St. Mary, under the firm of *P. H. & B. C. Robert*. The interest of the former was two thirds, and that of the latter one third. In 1838 the firm was dissolved by mutual consent, and *B. C. Robert* was charged with the liquidation of its affairs. In June, 1838, the liquidator placed in the hands of *Simon & Maskell*, associated as attorneys and counsellors in the practice of law, a large amount of notes, evidences of debt, and accounts, due to the firm, which they receipted for, as received for collection for account

of Messrs. *P. H. & B. C. Robert*. In 1839, *P. H. Robert* died; his succession was opened in the Probate Court for the parish of St. Mary, and *B. C. Robert* was appointed administrator of his succession. In 1840, *B. C. Robert* instituted proceedings as an insolvent debtor, in the District Court for that parish. The cession was accepted, and *W. C. Dwight* was duly appointed syndic, and recognized as such by a judgment of the court.

DWIGHT  
v.  
SIMON.

In 1841, the present suit was instituted by *Dwight*, as syndic, to recover from *Simon & Maskell* all monies collected by them upon the claims placed in their hands for collection, and the delivery of such as were uncollected. The plaintiff also prayed for general relief.

After certain exceptions were taken by the defendants, which will be presently noticed, *B. C. Robert* intervened in his capacity of administrator of *P. H. Robert*, alleged that the entire interest in the notes and claims was in the syndic and the administrator, that no one else had any right or interest in them, and that *Simon & Maskell* had been repeatedly requested to account and make delivery to them, but had refused. The intervenor joined in the prayer of the syndic.

To the petition of the syndic the defendants, in April, 1842, filed the following exceptions, praying the dismissal of the cause: "1. That the plaintiff, from his own showing, is syndic of *Baynard C. Robert* alone, and has no right to demand the claims due to the firm of *P. H. & B. C. Robert*, which must be applied first to pay the debts of the firm. 2. That *Joshua Baker* is the testamentary executor of *P. H. Robert's* estate, which is interested to the amount of two thirds of the property of *P. H. & B. C. Robert*; and said *Baker* alone has the right to claim the portion of property which belongs to the estate of said *P. H. Robert*. 3. That no surrender was made of the property, rights and credits of *P. H. & B. C. Robert*, nor could the same be legally done. 4. That *Joshua Baker*, as aforesaid, being entitled to two thirds of the claims belonging to the partnership of *P. H. & B. C. Robert*, and as such representative not having made a surrender, he has a legal right to demand the credits and rights of action belonging to said firm, in preference to the syndic of *B. C. Robert* or any one else."

After the intervention of *Robert*, as administrator, the following additional exceptions were filed by the defendants. "1. *William C. Dwight* claims as the syndic of *B. C. Robert*, who has made a surrender of his property, rights, and credits, individually and as a member of the firm of *P. H. & B. C. Robert*, under the bankrupt law of the United States; and therefore, the assignee of said *Robert*, alone, has a right to carry on this suit. 2. *B. C. Robert*, who has made himself a party to this suit as administrator of the estate of *P. H. Robert*, cannot stand in judgment in said capacity, because: *first*, having been bankrupt he cannot act as administrator of an estate; *second*, because *P. H. Robert* having made a last will and testament, no administrator can be legally appointed to his estate, but only an executor under the will."

In October, 1843, all these exceptions were tried together, and were overruled. Judgments by default were rendered, and subsequently the defendants answered to the merits.

We will at present enquire whether the exceptions were properly overruled, in October, 1843. It is clear that *W. C. Dwight*, being the syndic of one of the partners only, would not have been competent to maintain this action alone, and without the assistance of his partner's administrator. But this objection has been cured by the intervention of the administrator, who has united with him in the action, and is to be considered as a co-plaintiff in the cause.

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But the first and third grounds of exception go further, and contest entirely the interest and authority of the syndic with regard to the partnership assets and their collection—in short, his capacity to stand in judgment in this cause. In the consideration of this branch of the exception, we shall assume, for the present, that the co-plaintiff, the administrator of the estate of *P. H. Robert*, the only other partner, is the proper representative of his succession and partnership interest.

We have seen that the partnership was dissolved, and *B. C. Robert* charged with its liquidation, before he became insolvent and made a cession. By the effect of the cession, its acceptance by the court and the creditors at their meeting, and the recognition and entering into office of the syndic, all the property and rights of property of the insolvent became vested in his creditors, represented by the syndic as their trustee. Under our legislation, and the reported decisions of the Supreme Court, this proposition cannot be considered as admitting a doubt. See the acts of 1817 and 1826, and the cases of *West v. Creditors*, 8 Rob. 128. *Lawrence, syndic, v. Guion*, 9 Rob. 223.

What was the property of the insolvent at the time of the cession? It comprised not only his individual property, but also his interest in the firm of *P. H. & B. C. Robert*, then dissolved and in process of liquidation. It is quite true that the syndic of the insolvent partner did not become the owner of the partnership assets. They belonged to the partnership, and were subject to the payment of the partnership debts, and the liquidation of the rights of the partners *inter se*. But the residuary interest of the insolvent partner passed to, and became vested in, the syndic; and, as the representative of the insolvent partner, he was entitled to participate in the administration of the partnership assets, and the liquidation of the firm. The only interest in the partnership which remained in the insolvent after his cession, and its acceptance, was such contingent residuary interest as might remain after the full administration of the syndic, and the full and entire payment of all his debts—a contingency which has never happened.

But it was contended in the court below that, the interest of the insolvent in the partnership did not pass, and that no authority over the partnership assets and the liquidation of the partnership was vested in the syndic: because the partnership assets and the interest of the insolvent in the partnership, were not stated in the schedule.

It has been repeatedly held, that all the rights of property of an insolvent vest in his syndic, whether they be stated in the schedule or not. In *Muse, syndic, v. Yarborough*, 11 La. 521, the court said: "All the property of the debtor is presumed to be entered on the schedule, because he is to swear that it is; and if any has been omitted, it is clear it does not belong to the debtor, but passes to the creditors by the cession."

But it is not correct, in point of fact, that the insolvent did not embrace in his schedule his interest in the partnership. His partnership affairs are expressly referred to in his petition; in it, and in his schedule, he embraces, and actually presents and tenders to the court, all the commercial books of the firm. The receipt itself, for the great mass of the partnership assets, signed by the defendants, and which forms the basis of this action, appears to have been surrendered at the time. It bears the paraph *ne varietur* of the district judge, who signed the order accepting the *cessio bonorum*, and went into the possession of the syndic.

In the court below, at the trial of the cause on the merits, it was urged, and successfully, that the interest of *B. C. Robert* in the partnership vested in his assignee in bankruptcy. It appears that, in February, 1843, *B. C. Robert* pre-

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sented to the United States court his petition to be declared a bankrupt, and was so decreed, in March, 1843. His partnership, as well as his individual affairs and liabilities, were stated in his schedule. *Maskell*, the defendant, was appointed his assignee.

But all this was posterior to the insolvent proceedings in the state court, which are still pending, and where the syndicate exists in full force. The rights vested by the insolvent proceedings in the creditors of *Robert* and his syndic as trustee, were wholly unaffected by the action of the bankrupt, and of the federal tribunal under the bankrupt law. Nothing passed to the assignee but the residuary interest of the insolvent, after the full administration of the insolvent estate, and the entire fulfilment of the trust thereby created in favor of the creditors. This point is so clear, and has been so fully adjudged, that it would be a waste of time to enlarge upon it. See the Bankrupt Law. *West v. His Creditors*, 8 Rob. 129. See also *Schröder's Syndic v. Nicholson*, 2 La. 351. Being, therefore, satisfied that *Dwight*, the syndic of one of the partners, has a right to stand in judgment in this cause, and to maintain this action, provided his co-plaintiff has a legal capacity to represent the interests of the other partner, and assist in the liquidation of the partnership affairs, we proceed to the consideration of the administrator's capacity, which will necessarily involve the alleged authority of *Baker*, as testamentary executor. And for the purpose of simplifying the enquiry, we will, at present, test the question with reference to the state of things existing down to the 6th October, 1843, when, as already stated, the exceptions under consideration were heard and overruled by the predecessor of the district judge, who subsequently heard this cause on the merits.

The co-plaintiff, *B. C. Robert*, administrator of the succession of *P. H. Robert*, was duly appointed to that office in 1839, took the oath, and gave a bond which was duly filed by the parish judge, as his signature attests. Thus far he appears clothed with ample official authority. And we may here remark, that the defendant, *Maskell*, seems to have entertained no doubt upon that subject; for we find him, in his professional capacity, bringing a suit, in 1840, in the name of the administrator, against a debtor of the firm.

But it is shown that, near the close of the year 1840, *B. C. Robert* discovered a sealed paper purporting to be a will made by his deceased partner. He presented it to the Court of Probates in which the succession had been already opened, and under whose order he held his office; and prayed that the will might be opened, proved, and acted upon according to law. The will was accordingly opened: it was found to be an olographic testament. The hand writing was proved by witnesses, one of whom was the defendant, *Maskell*; and an order was made by which the will was recognized as being in due form. It was further decreed by the parish judge, as follows: "Being satisfied that said testator is dead, I have ordered said will to be executed, recorded, and deposited in my office, after signing the same, *ne varietur*, at the begining and end of each page."

Under this evidence it was contended that the appointment of the administrator was void. No authority has been adduced to sustain this proposition; and, in our opinion, it is clearly untenable. In the absence of a will, it was necessary that the succession should be administered; and the order appointing an administrator was clearly lawful, for the appointment in the will was inefficient until the probate. C.C. 1637.

But it is said that, as soon as the probate and order of execution took place, the authority of the administrator expired. This, also, is untenable. The ca-

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capacity of the administrator, for the purpose of prosecuting an existing suit, could not cease until a successor was duly installed in his stead. An executor is not bound to accept the executorship. C. C. 1670. When the exceptions were tried, nearly three years had elapsed since the probate of the will. The executor named in the will, during this entire period, was silent. There was no call by him, upon the administrator, for an account; no demand of the assets, not even a notice to the probate judge that he was willing to accept the appointment. If the administrator was ousted by the mere order of probate and execution, then the succession was under the charge of no one; and all the provisions of the law, framed for the preservation of successions, which require administrators to account before they are discharged, which require them to continue in office until the estate is wound up, and which otherwise discountenance the abandonment of estates, must be disregarded. It is in this spirit that, in the analogous case of an executor, and of heirs claiming the succession from him, we find it provided that the testamentary executor, even after the expiration of his administration, is bound to continue to defend the suits commenced by, or against him, on account of the succession, until the heirs appear, or cause themselves to be represented. Civil Code, art. 1669.

The opposite view to that which we have adopted, might be convenient to debtors; but would involve the destruction of the rights of creditors, and the ruin of heirs.

Upon the point that the capacity of the administrator ceased, *ipso facto*, by his bankruptcy, we have been favored with no authority, and consider it untenable. The administration was a trust held for the benefit of heirs and creditors, and not to be blended with the personal condition of the administrator. It might have been a ground for provoking his removal; but, of itself, did not impair his official authority.

We have no hesitation, therefore, in saying that the decree of 6th October, 1843, overruling the exceptions, was properly rendered.

But it appears that, when the cause came up for trial on the merits, these questions were again raised, and the successor of the former judge, while he expressed his regret that he was prevented from deciding the cause on the merits, was of the opinion that, the right of the plaintiffs to prosecute the claim, was still examinable; and, dissenting from the conclusions of his predecessor, dismissed the suit, considering the right of action as vested in the assignee in bankruptcy, and the executor named in the will.

What we have said as to the authority of the syndic, need not be repeated: but a few remarks are necessary respecting the right of the administrator to continue the prosecution of this cause.

It is true that, since the exceptions were first decided, *Baker*, after a long interval, for the first time appeared in the court of probates and took the oath of office. This was in July, 1845. A petition was also presented in his name, in September, 1845, by the defendant, *Maskell*, as his attorney at law, praying that an inventory might be made. An order to that effect was made. No other action by the executor is shown. No inventory, no call upon the administrator for an account, no intervention in this cause, nothing whatever appears, to indicate that the executor takes any interest in the prosecution of a suit in which the interests of the succession are seriously involved, and the existence of which, if not known to himself, is, at least, fully known to his counsel.

In view of these facts, we are of opinion that we should be misinterpreting the law, and doing injustice to the creditors of an insolvent partnership and of an

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insolvent succession, if we were to turn the present parties out of court, who are diligently, and in spite of the continued embarrassment which they have encountered, prosecuting a claim which no one else has shown any disposition to enforce. The assignee in bankruptcy cannot deny the authority of the syndic; and the executor has not taken the necessary action to oust the authority existing in the administrator to prosecute this cause.

The counsel of defendants refers, in his brief, to a previous suit, brought by *Dwight*, syndic, alone, against *Maskell* alone, in which the suit was dismissed upon the exception that, the plaintiff was not the syndic, as by him alleged, the proceedings under which he was appointed being illegal and void. He argues in his brief that, the judgment constitutes *res judicata*. No plea of *res judicata* was filed in the court below. Whether such a plea may be made for the first time in this court, is a question which we do not think it necessary to decide. It is certain that the exception of *res judicata* must be specially pleaded. Here the defendants have filed an answer to the appeal, in which they simply pray an affirmance of the judgment, but have not pleaded *res judicata*. In the matter of the *Commissioners of the Atchafalaya Bank, on the opposition of Barker*, we held that, the mere suggestion and argument, by counsel, in his brief, of matters upon which he relied for a change of the judgment in the appellee's favor, did not give the party a right to have them considered, where the appellee had filed no answer praying an amendment. The propriety of the rule is equally obvious in the present case; and there certainly are no equitable considerations which would make it proper for us now to give the party leave to file such a plea. It is proper also to remark that, the decree of 6th October, 1843, was partially executed by the defendant, *Maskell*, as will be hereafter noticed.

Upon the merits, we will first observe that, the defendants, *Simon* and *Maskell*, were associated in the practice of the law at the time of the receipt of the claims for collection, in June, 1838. They so continued until the year 1840, when the defendant *Simon* left the bar. It is proper to remark that the business thus placed in their hands, seems to have been, as between the partners, almost exclusively conducted by the defendant, *Maskell*. But, as the defendants were partners, as the receipt was signed in the partnership name, and as it is not proved that their clients subsequently abandoned the joint liability and agreed to look to *Maskell* alone, we must consider both the defendants liable. On this point it is proper also to remark that, in a former action upon the receipt against *Maskell* alone, the exception was pleaded that the liability was joint, and that the action could not be maintained against *Maskell* alone.

One of the grounds of defence, suggested in argument, is that, the assets were placed in the hands of the defendants for the purpose of paying certain creditors, and hence that the defendants could not give them up without the authority of such creditors. And we find that, about four years after this suit was instituted, a petition of intervention was filed by *Lewis & Co.*, creditors of *P. H. & B. C. Robert*, *Maskell* acting as their attorney, in which they allege that *P. H. & B. C. Robert* placed as a pledge or pawn in the hands of *Maskell* and *Simon*, the notes and claims in question, for the benefit of the intervenors; and that by said pawn or pledge they have a privilege upon them. We have seen that the receipts state that the claims were received for the account of *P. H. & B. C. Robert*; and, although the evidence shows that, from time to time, payments were made by *Maskell* to creditors, sometimes by *P. H. Robert's* direction, and sometimes without any previous or express instruction shown, yet the intervenors have wholly failed to show that any act of pledge was exe-

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cuted. Nor, as to the other creditors, do the evidence and acts of *Maskell* show that the assets were placed beyond the control of the firm, so as to constitute the transaction an assignment for the benefit of creditors.

After the decision on the exceptions, made in 1843, a number of the uncollected claims were deposited in court, by *Maskell*, upon his motion, to remain there subject to the syndic's order, upon his receipting for them. Subsequently the case was referred to auditors, who, after hearing testimony offered by the parties, made a report, in which, after stating the accounts, reserving the question of the liability of the defendants for alleged negligence with regard to collections and some other disputed matters, they found a balance against the defendants, independent of the claims against them not reported upon, of \$1,247 88. To portions of this report both parties objected; and it does not appear that the objections to it were formally acted upon, before the submission of the cause to the court upon the issue joined. At the trial, the report of the auditors, with the evidence, and also the oppositions, were offered in evidence by the defendants; and an agreement was entered that, the report should be deemed conclusive and binding so far as not specially objected to. This report, which appears to have been diligently prepared, has therefore received our attention, and we have given it much weight in forming our conclusions.

We think the auditors properly rejected the items charged by the defendants for payments of individual debts of *B. C. Robert*, and sums given to his wife, although some of them appear to have been paid or given by his instructions, or with his implied approbation. It is true that, by the articles of dissolution, *B. C. Robert* was charged with the liquidation of the firm; and if *Maskell* had handed over monies collected to the liquidator, he could not have been answerable for their subsequent misappropriation to his own use. But, as a partner who uses the partnership funds to pay his individual debts, commits a fraud upon the firm, so an agent, acting for the benefit and in the business of the firm, who, even by the express direction of one partner, applies the money of the firm in his hands to the payment of the individual debts of that partner, or otherwise to that partner's individual use, violates his legal duty as the agent of the firm, and must be held liable to the creditors, whom these plaintiffs represent. His recourse is against the partner individually, by whose instructions he acted, and to whose benefit the payments inured.

The auditors excluded from this account, by which they ascertained the balance above mentioned, certain credits allowed in the account with the partnership prepared by the defendant *Maskell*, which was before the auditors. They perhaps entertained the opinion that these credits, which were for various sums received for account of the firm by the defendant, did not properly enter into the litigation, because the claims upon which they were made were not comprehended in the receipt upon which the action was brought. But, considering the prayer for general relief made by the plaintiff, the answer of the defendant, with its annexed account, and the manner generally in which the case has been brought before us, we are of opinion that these credits are to be considered, and that the plaintiffs should have the benefit of them.

The auditors appear to have charged interest on the amount of the claims entrusted to the defendants for collection, and collected, from the maturity of the claims down to the month of December, 1846, when their report was made; and upon the payments made by the defendants from the date of the maturity of the obligations paid, to October, 1846. We think this was erroneous.

DWIGHT  
v.  
SIMON.

Upon examining the accounts, we find that the latest collections of the defendants were in 1841, and their latest payments, also, in that year; and it was in that year also, that the plaintiffs put them in default. From the amount of cash received by them, we will deduct the payments for which they are entitled to credit, and give interest on the balance from the judicial demand. We have to remark, in this case, that the account was not of that character where, from mutual debits and credits as between merchants, the entire means of liquidation may not be in the power of either party. Here, the means of liquidating and ascertaining the balance were fully in the hands of the defendants, that is to say, of *Maskell*, one of the firm, who knew what had been received for the account of the partnership of *P. H. and B. C. Robert*, their employers, and what had been paid for their account; and who were bound also to know that the payments for the individual benefit of *Robert* were not lawful. Moreover, it seems to us that, an attorney at law should not be held to a less onerous responsibility, in such a case, than an attorney in fact; and we find it declared by the Code that, "the attorney is answerable for the interest of any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over." C. C. art. 2984.

We allow compensation, for professional services rendered before the call made upon the defendants to account and deliver the assets and balance in their hands. We adopt, on this point, the amount allowed by the auditors, as a sufficient compensation for all the professional services of the defendants.

The auditors expressed no opinion upon the question of the alleged want of diligence in the collection of the assets. Under the evidence, we have not been able to come to a satisfactory conclusion, so as to close that part of the case. We shall reserve the question of the alleged liability of the defendants, on that score; and also the question, whether any, and what, damages have been incurred, by refusing to deliver the uncollected assets when required to do so.

The defendant *Simon* has disclaimed all agency in the receipt, or detention, of the notes and accounts entrusted to *Simon & Maskell* for collection, or of their proceeds; and we do not find that he had any participation in this business; but, we do not think this fact of non-interference exonerates him, in any manner, from the responsibility incurred by the partnership, to whose charge the claims were confided. The parties were attorneys and counsellors at law, practising in their profession, and, as we conceive, are equally responsible towards their clients for monies collected and not paid over.

It is, therefore, decreed that, the judgment of the district court be reversed, and that *Wm. C. Dwight*, syndic, and *Raynard C. Robert*, administrator, do recover from *Edward Simon* and *Thomas Maskell*, the sum of sixteen hundred and ten dollars and sixty-nine cents, with interest thereon from the 22d Sept. 1841, and costs of suit in both courts; the said sum being for monies collected previous to said date, deducting the payments and charges allowed them according to the previous opinion. And it is further decreed that, the remaining portion of said claim of said *Dwight*, syndic, and *Robert*, administrator, to wit, for the possession of the claims not collected at the date of the institution of this suit, and for damages for the detention thereof, be remanded for a new trial. It is further ordered that, the intervention of *Davis & Co.* be dismissed at their costs.\*

\*The decree in this case and the paragraph immediately preceding it, were written by the Chief Justice, at the September term, 1849, and added to the opinion prepared by *SLIDELL, J.*





**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**SUPREME COURT OF LOUISIANA,**  
 AT  
**ALEXANDRIA,**  
 IN  
**SEPTEMBER, 1849.**

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PRESENT: \*

Hon. GEORGE EUSTIS, *Chief Justice.*

Hon. PIERRE ADOLPHE ROST,  
 Hon. GEORGE ROGERS KING,
 }
*Associate Justices.*

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**VIENNE v. POLICE JURY OF NATCHITOCHES.**

Under sec. 37 of the stat. of 3 May, 1847, providing a revenue for the support of the government, the compensation allowed to the assessor of taxes mentioned therein, is not limited to a per centage on the amount of the state taxes only. Sec. 7 of the stat. of 16 March, 1848 cannot affect this interpretation of the stat. of 1847, as to the compensation of assessors for the year 1847, under the stat. of that year.

**A**PPEAL from the District Court of Natchitoches, *Taylor, J. Boyce*, for the plaintiff. *Pierson*, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action to recover from the parish of Natchitoches the sum of three hundred and thirty three dollars, being the amount alleged to be due to the plaintiff as assessor of taxes for the said parish, being three per cent on the amount of the assessment roll for the year 1847. The parish is charged as being liable to the plaintiff under the 37th section of the act of 1847, entitled an act to provide a revenue for the support of the government of this State. Acts of 1847, p. 172.

The defendant, by counsel, has contended that, by the section quoted, the only compensation for the assessor therein provided for, is that allowed for the state taxes. But this construction is against the evident sense of the whole section, and would leave a large portion of it without any meaning at all. It is the duty of the court to adopt a construction which will give effect to the whole

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\* SLIDELL, J. was not present during this term.

VIENNE  
v.  
POLICE JURY.

section as it is written, whatever alteration may have been made in the law by the re-enactment of the 37th section of the act of 1847, in the 7th section of the act of 1848. See laws of 1848, p. 132. And it appears by that section that the additional compensation to the assessors, on the part of the parishes, is excluded. The compensation due the assessor for the year 1847, under the previous act, is not affected by the change. *Judgment affirmed.*

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POLK v. CHILDERS, Executrix.

The certificate of the clerk of a district court that, a transcript contains all the proceedings had, documents filed, and evidence adduced on the trial of a case in which a judgment had been rendered by a court of probates, but in which an appeal was allowed by the district judge after the court of probates had ceased to exist, where the clerk evidently had no other means of ascertaining the facts in relation to which he certifies than by an inspection of the original record, in which neither the certificate of the probate judge nor of his clerk that the record contains all the evidence, nor any list of the documents produced, are to be found, is insufficient, and the case must be remanded. C. P. 1042.

**A**PPEAL from the Court of Probates of Sabine, *Speight, J.* No counsel appeared for the plaintiff. *Thomas, Morse, Roysdon, and Flint*, for the appellant. The judgment of the court was pronounced by

KING, J. We are unable to examine this cause upon its merits. It was tried by the late probate court, and a final judgment, on a default, was rendered in 1845. The appeal was granted by the district judge, in June 1846, after the court which decided the cause had ceased to exist. The clerk of the district court certifies that the transcript contains all the proceedings had, documents filed, and evidence adduced on the trial of the cause. But the clerk evidently had no other means of ascertaining the fact in relation to which he certifies than by an inspection of the original record, in which are to be found neither the certificate of the probate judge, nor of his clerk, that the record contains all the evidences, nor a list of the documents produced, which the law then imperatively enjoined to be made. C. P. 1042. The cause having been tried by the probate court, it must be governed by the rules which regulated the proceedings of that court. Under the authority of the cases of *Tompkins v. Benjamin*, 16 La. 199, and of *Desormes v. Desormes*, 17 La. 115, the cause must be remanded.

The judgment of the District Court is therefore reversed, and the cause remanded to be proceeded with according to law; the appellee paying the costs of this appeal.

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RACHAL et al. v. RACHAL et al.

The fact that a witness is a son-in-law of the party by whom he was offered, is an objection to his credibility, but not to his admissibility.

Simulation in written acts, when alleged by third persons or forced heirs, may be proved by parol.

A copy of a writing, not authenticated by the proper officer, is inadmissible, not being the best evidence in the power of the party offering it.

Where the witnesses to an act of partition *sous seing privé*, containing donations to the children of the party by whom it was made, are dead, and their signatures are proved, no

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| 119 | 684  |

objection can be made to the admissibility of the act in evidence, on the ground that it was not authentic.

A mother, co-defendant with her son, may be interrogated on facts and articles ; but her answers are not evidence against the son. They can only affect the party by whom they were made.

The action of forced heirs, in which the sale from a parent to his children is attacked as containing a disguised donation, is not derived from the ancestor, but from the law. So far as their *legitime* is concerned they are not heirs, but creditors.

RACHAL  
v.  
RACHAL.

**A** PPEAL from the district court of Natchitoches, *Taylor, J. Campbell*, for the plaintiffs. *M. C. Dunn*, for the defendants. The judgment of the court was pronounced by

ROST, J. This suit is instituted under article 2419 of the Code, which authorizes forced heirs to attack the sales of parents to children as containing disguised donations. There was judgment in favor of the plaintiffs, and the defendant, *Prudent Rachal*, appealed.

On the trial of the cause the plaintiffs offered *H. F. Twichel* as a witness. The defendants objected to his testimony, on the ground that he is the son-in-law of one of the plaintiffs, and took a bill of exceptions to the opinion of the court overruling the objection. The district judge did not err. The objection made went to the credibility of the witness, not to his admissibility. *Bernard v. Vignaud*, 10 M. R. 485.

The defendants also objected to the testimony of this and other witnesses, on the ground that the questions asked went to explain or to contradict written acts ; but the evidence was received, the court considering it the best mode by which the simulation could be proven, and bills of exception were taken. This evidence was properly admitted. Simulation, when alleged by third persons or forced heirs, may be proved by parol. 1 La. 239. 6 M. 525.

The defendants offered in evidence a schedule of an auction sale of the effects of *Prudent Rachal*, on proving by a witness that the auctioneer named therein had acted on the occasion as auctioneer, and had signed the original of which a copy was offered in evidence. The court, on the objection of the plaintiffs, refused to admit this evidence, on the ground that it was a copy, and that the original should be produced or accounted for. The defendants excepted. The court did not err. The paper offered was not the best evidence in the power of the party offering it, not being authenticated by the proper officer.

The plaintiff offered in evidence an act of partition containing donations to his children, to take effect after his death, and anterior in date to the sale to *Prudent Rachal*. The defendants objected to its introduction, on the ground that it was not authentic ; but the court overruled the exception, and they took a bill of exceptions. The witnesses to the act were all dead, and their signatures were proven. The date of the act was certain, at least, up to the death of the witness who died first, and there could be no reason not to receive it as evidence.

The plaintiffs had filed interrogatories to *Marie Rosalie Rachal*, the widow of *Dominique Rachal*, and one of the defendants in the suit.

*P. Rachal* objected to these interrogatories being answered, on the ground that the party interrogated was his mother and could not testify against him. The judge properly overruled the objection ; but the answers to these interrogatories are not evidence against *Prudent Rachal* ; they can only affect the party who made them.

On the merits, the plaintiffs have shown satisfactorily that the sale to *Prudent Rachal* was a disguised donation, and that no consideration passed. They have also established the value of the property transferred to be \$15,000, and

RACHAL  
v.  
RACHAL.

that the sale included all the property of their ancestor, except a few moveables valued in the inventory at \$61 50. They have therefore made out the case alleged in their petition, and are entitled to recover, unless the peremptory exception, filed by the defendant during the trial, can be sustained. It is as follows : The defendant, *Prudent Rachal*, files a peremptory exception to the plaintiffs' petition, inasmuch as they charge that the contract of their ancestor, *Dominique Rachal*, was illegal, immoral, and contrary to public policy, and that they can no more recover under such a contract than he could if still alive.

The petition contains no allegation that the sale was made for a fraudulent purpose ; but some of the plaintiffs' witnesses have stated in their evidence their belief that, the object of the sale was, at the beginning, to place the property conveyed out of the reach of a suit then pending, and in which *D. Rachal* was cited as warrantor. The alleged object of *Dominique Rachal* in making this sale cannot affect the rights of his forced heirs. The action by which they seek to enforce those rights is not derived from him, but from the law. So far as their *legitime* is concerned, they are not heirs ; they are creditors. The exception is not tenable.

*Judgment affirmed.*

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#### EDELIN v. RICHARDSON.

A judgment will not be reversed on the ground of its not allowing interest, where the amount of interest was but small, and the omission was not made a special ground for a new trial.

**A**PPEAL from the District Court of Rapides, *Cushman, J. Elgee and Hyams*, for the appellant. *Ryan*, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff, who is an attorney and counsellor at law, brought his action against the defendant to recover the sum of \$1000, with interest from judicial demand, for professional services rendered the defendant in a controversy arising under the last will of his deceased wife, and in relation to the community of acquets and gains which had existed between the defendant and his said wife, which services the plaintiff alleges to have been well worth the said sum of \$1000. The case was submitted to a jury, who found a verdict for the plaintiff for the sum of three hundred dollars. Judgment being rendered for that amount, the plaintiff has appealed.

It appears that the plaintiff was employed by the defendant as assistant counsel, and that the ground of controversy in which his interests were involved was the effect of the birth of a child subsequent to the date of the will, upon its validity. The principal counsel was examined as a witness before the jury, and the main services rendered by the plaintiff were in consultation with the witness on the question of law above stated. Another gentleman of the bar was also employed by the defendant, to aid in the affairs of the defendant's wife's succession. The business was terminated shortly after by a compromise.

Three gentlemen of the bar, examined as witnesses by the plaintiff, estimate the services of the plaintiff at a larger sum than that allowed by the verdict. It is obvious that, the testimony of the principal counsel, who could alone be acquainted with the character of the services rendered in counsel by the plaintiff, and who had the means of forming a correct estimate of their value, is entitled to great weight in forming a conclusion on that subject. If the jury took this

testimony for their guide, they certainly were at liberty so to do in the exercise of their deliberate judgments. The witness considered the plaintiff's services as worth more than two hundred and fifty dollars, and that if the defendant had paid the plaintiff five hundred dollars he would have done himself no injustice; and very properly adds that he finds it difficult to estimate the value of the plaintiff's professional services, from the want of any positive criterion in such a case as this. We understand the witness as affirming only that, the value of the services exceeded \$250. The estimate of the three gentlemen, as to a higher rate than that given by the verdict, we do not understand to be concurred in by two other gentlemen of the profession, who were examined on the part of the defence.

EDLIN  
v.  
RICHARDSON.

The object of the appeal is not to obtain a new trial, but a judgment for five hundred dollars—the amount at which the plaintiff's services are estimated by his witnesses. As we have had occasion to observe, in a late case of this kind, the responsibility of determining the amount of fees due for professional services is a matter of great delicacy; and, under the rules under which our predecessors have acted, the court must be guided by a conscientious estimate of their value. *Succession of Macarty*, 3 An. Rep. 621. Counsel fees are, in point of fact, from their very nature, honorary, and are not susceptible of an accurate appreciation in money. The jury having passed upon the whole evidence, which is not concurrent, we do not feel ourselves at liberty to give the plaintiff a larger sum than that awarded to him by the verdict.

It is objected that the judgment allows no interest; but we think this ought to have been made specially one of the grounds for a new trial. *Grailhe v. Houn*, 1 Annual, 140.

*Judgment affirmed.*

### GAMARD v. HART et al.

Where the judgment enjoined bears interest at ten per cent a year, the court, on dissolving the injunction, cannot increase the interest. Whatever else it may be proper to allow, must be in the form of damages.

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**A**PPEAL from the District Court of Rapides, *Cushman, J. Ryan*, for the appellant. *Elgee and Hyams*, for the defendants. The judgment of the court was pronounced by

KING, J. *B. B. Hart and Labadie and Jaquelin* obtained judgments against *Gamard*, and caused writs of *fieri facias* to issue, under which the sheriff seized a slave. The plaintiff, representing his minor child, *George Alfred*, instituted this action to enjoin the execution of the writs, alleging that the slave seized belonged to his minor son, in virtue of a donation from one *Valletti*, duly accepted. The defendants, in their answer, aver that the pretended act of donation is simulated and fraudulent, and was made for the purpose of placing the slave beyond their pursuit. They pray for a dissolution of the injunction, with damages. The cause was submitted to a jury, who returned the following verdict: "We, the jury, find for the defendant." A judgment was thereupon rendered dissolving the injunction, and condemning the plaintiff, and his surety on the bond, *in solido*, to pay ten per cent per annum interest on the amount of the judgment enjoined, from the date of the injunction, with fifty dollars damages as counsel fees, and the costs of suit, from which the plaintiff has appealed.

GAMARD  
v.  
HART.

The evidence, in our opinion, fully establishes the act of donation from *Valletti* to *George Alfred Gamard* to have been a simulation, and supports the verdict of the jury.

The facts, as they appear from the evidence, are briefly these: *Alphonse Gamard*, the father, originally purchased the slave in controversy, in 1840. In 1843, but a few weeks previous to making a cession of his property, by a private act, admitted to record after the filing of his surrender, he sold the slave to *Valletti*, for \$400, acknowledging to have received the price in cash. In September, 1845, *Valletti* made the alleged donation to the minor *George Alfred Gamard*. *Gamard* was a country merchant, doing a very limited business. He was insolvent, by his own admissions in his proceedings on his surrender, at the date of his sale, and continued to be much embarrassed in his affairs at the date of the donation. *Valletti* was his clerk, not possessed of the means necessary to make the purchase, and receiving, according to the testimony, a salary not exceeding twenty five dollars per month. The donation was made about the time that *Valletti* was leaving the country. No change of possession is shown to have followed any of the acts, *Gamard* appearing to have always remained in possession from the date of his purchase in 1840. This testimony, we think, authorized the conclusion of the jury that, the sale from *Gamard*, and the donation from *Valletti*, were simulations.

But it is contended that, the district judge erred in allowing interest, and counsel fees, which were not authorized by the verdict.

It is not important to enquire whether the judge possessed the power, under the act of 1831, to award interest and damages on the dissolution of the injunction, notwithstanding the silence of the verdict on these points; as the whole case is before us upon the evidence, it becomes our duty to render such a decree as, in our opinion, should have been rendered in the court below, and to allow such damages as the defendants may be entitled to.

We think that the judge erred in awarding ten per cent interest on the amount of the judgments enjoined, as both of the judgments previously bore interest at that rate. 19 La. 303. 3 Rob. 123. The judge must have considered the defendants entitled to damages, which were allowed as interest; and, in concurring with him in that opinion, we will give the defendants ten per cent as general damages; also fifty dollars, special damages, for counsel fees, which the evidence shows to be reasonable.

It is, therefore, ordered that, so much of the judgment appealed from as condemns the plaintiff, and his surety, *John Kirley*, to pay interest at ten per cent per annum on \$1581, from the 6th day of March, 1847, until paid, with \$50 damages, for counsel fees, be reversed. It is further ordered that, the defendants *Bernard B. Hart*, and *Labadie* and *Jaquelin*, recover of *George A. Gamard*, represented by *Alphonse Gamard*, and his surety, *John Kirley*, in solido, one hundred and fifty eight dollars, being ten per cent as general damages on the amount of the judgments enjoined, and the further sum of fifty dollars as special damages for counsel fees, and the costs of the lower court. In other respects, the judgment appealed from is affirmed; the appellees paying the costs of this appeal.

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## STATE v. BROWN.

Decision in *State v. George*, 8 Rob. 535, as to when the formation of an opinion as to the guilt of a prisoner will disqualify a juror, affirmed.

It being material, in the interest of justice, that the motives and prejudices, as well as the means of knowledge, of a witness, should be laid before a jury, great latitude is allowed in his cross-examination. But this latitude is necessarily, to a certain extent, confided to the discretion of the judge of the first instance.

To enable an appellate court to determine whether a decision, of the judge of the first instance be within the legal discretion vested in him, all the facts material to the decision must appear from the bill of exceptions.

A jury will not be authorised to infer the existence of any bias or prejudice on the part of a witness against a prisoner, from the fact that the witness, though not an officer of the peace, and without any warrant, and not summoned by any officer to aid in arresting the prisoner, had taken great pains to do so.

**A**PPPEAL from the District Court of Rapides, *Cushman, J.*  
*Isaacks*, district attorney, for the State.

*Ryan, A. N. Ogden and Hyams*, for the appellant, cited *Lithgow v. Commonwealth*, 2 Va. Cases, 297, quoted in 2 U. S. Dig. *verbo* Juror, no. 114. *Bacon's Abridg. verbo* Juries, 258. 1 *Burr's Trial*, 371 to 420. *People v. Mather*, 4 Wend. 245. *Ex parte Vermilyea*, 6 Cowen, 555. *People v. Jewel*, 3 Wend, 314. *United States v. Wilcox*, 1 Bald. 78. *Queensbury v. State*, 1 Stew. and P. 308. *Commonwealth v. Knap*, 9 Pick. 496. *Boardman v. Wood*, 3 Vermont, 570. *Laverty v. Gray*, 3 Mart. 620.

The judgment of the court, on the first bill of exceptions, was pronounced by KING, J. The defendant was convicted of manslaughter, and, after sentence, appealed. The questions which arise are presented in two bills of exception taken to opinions of the judge on the trial. The first is to the refusal of the judge to permit the prisoner to challenge four jurors for cause. The statements of the jurors on their *voir dire* examinations were reduced to writing, and have been appended to the bill of exceptions. Their statements are as follows :

"*James R. Andrews* sworn : On being asked if he had formed and expressed an opinion in relation to the guilt or innocence of the accused, says that, he has from what he has heard. On being interrogated by the court, he says that his opinion is not such as to bias his mind, should the evidence which may be adduced on the trial be different from what he has heard in relation to the matter. He never heard the witnesses speak on the subject.

"*M. Layssard* sworn : On being asked by the counsel for the accused, if he had formed and expressed an opinion in relation to the guilt or innocence of the accused, says that, from report he believes he has. On being questioned by the court, he states that the opinion he has formed is not so fixed that it could not be changed by the evidence which may be adduced on the trial, should it be different from what he has heard ; thinks he could do justice between the State and the accused ; his opinion is not so deliberately formed as to resist impressions which may be made by the evidence.

"*John B. Calland* sworn : On being asked by the counsel for the prisoner, if he had formed and expressed an opinion in relation to the guilt or innocence of



STATE  
v.  
BROWN.

the accused, says that he has, from rumor. On being questioned by the court, he states that his opinion is not so deliberately formed as to resist impressions which may be made by the evidence; should endeavor to do justice between the State and the accused, if sworn upon the case; that his mind is open to receive any impressions which the evidence, should it be different from what he has heard in the matter, may disclose.

"*R. Winfield* sworn: On being asked if he had formed and expressed an opinion in relation to the guilt or innocence of the accused, says that he has from what he first heard of the case. On being interrogated by the court he says that, he has heard several speak of the matter; does not know if they are witnesses or not; his opinion is not so fixed but that it might be changed from the evidence. Thinks that, if sworn upon the case, he could do justice between the State and the accused. Has no prejudice upon his mind."

The judge held these jurors to be competent. The two first were challenged peremptorily by the prisoner, and the two last were sworn as jurors, and sat on the trial. The counsel for the accused contend that, the jurors were not such as the law deems impartial, and rely mainly on the cases of *The People v. Mather*, 4 Wend. 245. *Ex parte Vermilyea*, 6 Cowen, 555. The same case, 7 Cowen, 108. *Laverty v. Gray*, 3 An. 620.

The point is one which has been so frequently raised and decided, that it must in a great measure depend upon the authority of adjudicated cases. In England, the objections now urged to the jurors would not have been sustained. Hawkins, b. 2, chap. 42, sec. 28, says that: "It hath been adjudged a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before hand that, the party is guilty, or will be hanged, or the like; yet it hath been adjudged that, if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." This was recognized to be law in the case of *The King v. Edwards*, 4 Barn. & Ald. 470, and is laid down as a primary rule by Chitty in his work on criminal law, 1 vol. 542. In the elaborate opinion pronounced in the case of *The People v. Vermilyea*, 7 Cowen, 121, the correctness of the rule as stated in those authorities, was questioned.

It is not to be denied that, upon this, as upon almost every other point of criminal jurisprudence, there have been conflicting decisions in the different States of this Union. But, as far as we have been able to extend our inquiries with the limited means at our command, the great preponderance of authority is in favor of the rule that, when the opinion of the juror, in favor of or against the prisoner, has been formed on mere rumors or reports, such an opinion does not disqualify him, if his mind has been kept free from bias or prejudice, or has received only such impressions as may be removed by evidence. But, where a deliberate opinion has been formed, the jurors have, in most cases, been excluded. This is substantially the rule laid down by Chief Justice Marshall in *Burr's Trial*, vol. 1, 416, and adopted by the late Court of Errors and Appeals in the case of *the State v. George*, 8 Rob. 537. The courts of several of the States have gone much further.

The American decisions upon this point have been collected in Wharton's American Criminal Law, 605, *et seq.* We have been unable to refer to the adjudicated cases from which the author has extracted the principles laid down in his work; but his general accuracy authorizes us to rely on their correctness.

In Virginia, where the strictness of the common law is said to be most rigidly enforced in criminal proceedings, a juror who, on his *voir dire*, said

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v.  
BROWN.

that, "he had expressed an opinion on the circumstances as he had heard them narrated in the country, but he had not heard any of the evidence given on the examination of the prisoner, nor conversed with any of the witnesses or parties, and he did not think the opinion so formed would have any influence on his mind in trying the case," was held to be an indifferent juror. In another case, the juror "had heard reports concerning the case in the country, and a statement of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror; he believed the account he had heard of the case at the time he heard it, (and he did not now express any doubt of its truth); if the evidence on the trial should correspond with the account he had heard, his former opinion would remain; but if it should be different, he felt satisfied he should be able to decide the cause without being influenced by what he had before heard, and without prejudice." He was held to be an impartial juror. Other cases are cited, but these are sufficient to illustrate the rule as it prevails in that State.

In the States of North Carolina, Mississippi, Tennessee, Indiana, and Illinois, substantially the same rule obtains. See Wharton's Am. C. Law, 605 *et seq.*, and the authorities there referred to.

In Massachusetts the law appears to have been otherwise settled; and it is contended that, in New York, the rule is, that the juror will be excluded if he has formed an opinion upon mere rumor. The decisions of that State to which we have been referred, are conflicting. In the case of *Von Alstyme*, as we find it stated in *Ex Parte Vermilyea*, 6 Cowen, 565, Chief Justice Spencer said: "If a person had formed or expressed an opinion for or against the prisoner on a knowledge of any of the facts attending the murder, or from information of those acquainted with the facts, he considered it a good cause of challenge; but if the opinions of the jurors were formed on mere rumors and reports, he decided that such opinions did not disqualify the jurors." See also the case of *Durrell v. Masher*, 8 Johns, 445.

The case *Ex Parte Vermilyea*, 6 Cowen, 555, and same case, 7 Cowen, 121, does not, in our opinion, sustain the position assumed by the defence. The juror there declared that he heard all the evidence given on the former trial, having been present at it; that he had made up his opinion perfectly, on the evidence, that the defendants were all guilty, and had frequently expressed his opinion to that effect. That, if the testimony given on this trial should appear as it did on the former, he should certainly find the defendants all guilty." This juror was held to be incompetent, and, we think, correctly.

The case of *The People v. Mather*, 4 Wend. 245, is the only one from that State, to which we have been referred, which supports the ground assumed by the prisoner's counsel.

In this conflict of authority we adhere to the rule adopted in the case of *The State v. George*, 8 Rob. 537, which, in our opinion, denies to the prisoner no right accorded to him by law.

The judgment of the court on the second bill of exceptions was pronounced by

EUSTIS, C. J. Another bill of exceptions was taken by the counsel for the prisoner on the trial of the cause. It is to this effect: Be it remembered that, on the trial of the cause, when one of the witnesses on the part of the State was under cross-examination, the defendant's counsel proposed to show by the same witness, that he had taken great pains to arrest the said defendant, and had

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gone into the country in pursuit of him, he having no warrant or authority to arrest him, and not being a peace officer, and not having been called upon by any such officer to aid in arresting the prisoner. The object and purpose of which evidence was, to show a bias and prejudice on the part of the witness against the accused; and so announced by counsel. But the court refused to permit the questions to be asked the witness, to which refusal the counsel for the defendant excepted, &c.

It being material, in the interest of justice, that the motives and prejudices, as well as the means of knowledge, of a witness, should be laid before the jury, great latitude of interrogation is allowed in the cross-examination. But this latitude is necessarily, to a certain extent, confided to the discretion of the judge who sits at the trial. The protection of the witness, and the discipline of the court, necessarily vest this power in the judge under whose supervision the proceedings are conducted.

It is well settled in courts of common law, that error will not lie upon what is matter of discretion in a court; and it follows that, in order to enable a court of appeal to determine whether a decision of a judge of the first instance is, or not, within the legal discretion vested in him, all the facts which are material to the decision must be presented, in order to enable the appellate court to determine on the legality of the decision on which its judgment is sought.

In this respect the bill of exceptions under consideration is totally defective. It does not state what the witness had testified to, and gives no account of his principal examination, nor of the cross-examination, nor at what stage of the latter, nor what had already been proved at the time when the questions stated in the bill of exceptions were submitted.

Nor are we prepared to say that, had the witness answered them affirmatively, the jury would have been justified in inferring from the acts a bias and prejudice, on the part of the witness against the prisoner. By the common law, private persons are enjoined to arrest an offender when present at the time a felony is committed, and when not present they may arrest a person on reasonable and probable grounds of suspicion. The witness may have been present when the homicide, charged in the indictment as murder, was committed; and his taking great pains in the discharge of his duty as a citizen ought to subject him in law to no charge of bias or prejudice against the prisoner. A jury would not be authorized in inferring the existence of either under such circumstances. Had the witness answered the questions in the negative, the prisoner could not have contradicted him by other evidence, for the facts which the questions sought to bring out were collateral and irrelevant to the issue. 1 Greenleaf on Evidence, 449.

We think, therefore, that this bill of exceptions presents no error of law, upon which the judgment of the District Court can be reversed.

*Judgment affirmed.*

**CASES**  
ARGUED AND DETERMINED  
IN THE  
**SUPREME COURT OF LOUISIANA,**  
AT  
**MONROE,**  
IN  
**OCTOBER, 1849.**

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PRESENT: \*

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPHE ROST, }  
HON. GEORGE ROGERS KING, } *Associate Justices.*

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**JACOBS v. CALDERWOOD.**

The delegation by which a debtor gives to his creditor another debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared his intention to discharge the debtor by whom the delegation was made. The acceptance by the creditor of such a *stipulation pour autrui* will not authorize the inference that he intended to discharge the original debtor. C. C. 2188.

Where the notes secured by a mortgage have all matured before the sale under an order of seizure and sale, and are of like nature and dignity, they must be paid proportionally out of the fund.

Prescription as to the original debtor is not interrupted by an hypothecary proceeding against the mortgaged property in the hands of a third person; nor will it be interrupted by a partial payment made through the judicial sale produced by such hypothecary proceedings.

A debtor who makes a payment is considered as interrupting the prescription running in his favor, because there is an implied acknowledgement of the creditor's right. But no such acknowledgment can be inferred from a payment made, not by the debtor, but without his knowledge or participation, and through a judicial proceeding to which he was not a party.

**A** PPEAL from the District Court of Ouachita, *Barry, J. Purvis and Copley,* for the appellant. *McGuire and Ray,* for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The defendant executed two notes in favor of *Jacobs*, each for \$750. The first fell due in March, 1842, and the second in March, 1843. They were given for the price of a house and lot, sold by the plaintiff to the defendant.

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\* SLIDELL, J. was not present during this term.

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CALDERWOOD.

In 1841, the defendant sold the property to *Hanna*, who assumed, as the consideration of the sale, to pay the notes, agreeing to put himself in the place, stead, and responsibility of *Calderwood* to *Jacobs*.

In April, 1842, *Jacobs* instituted an hypothecary action against *Hanna*, and obtained a decree of seizure and sale. The proceeds of sale were insufficient to pay the mortgage debts. *Jacobs* afterwards brought a personal action against *Hanna* upon his assumption, and before the trial of the present suit obtained judgment against him personally, for the residue. The object of the present suit is to recover from *Calderwood*, the unpaid balance of the notes.

It is certain that *Calderwood* was once the debtor of the plaintiff; and he must have continued to be so unless the plaintiff has consented to his discharge. It is not pretended that an express consent has been given; but the defendant argues that his release results, by legal implication, from the facts already stated. In this view we do not concur.

The original debt was not novated. Novation is a contract consisting of two stipulations: one to extinguish an existing obligation, the other to substitute a new one in its place. Code 2181. The preëxistent obligation must be extinguished; otherwise there is no novation. - Ib. 2183. Novation is not presumed; the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt. Ib. 2186. The delegation by which a debtor gives to the creditor another debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. Ib. 2188.

Applying these principles to the case before us, it is impossible to deduce the discharge of *Calderwood* from the acceptance by the plaintiff of the stipulation *pour autrui*, made in the contract of sale between *Calderwood* and *Hanna*. *Hanna's* liability was superinduced upon that of *Calderwood*, which still subsisted, and which the creditor did not intend to relinquish.

Pothier, in commenting upon the rule that, a novation is not to be presumed, unless the intention of the creditor to affect it clearly appears, puts the following case: "C'est pourquoi si, dans la même espèce, ayant fait une saisie et arrêt sur *Jacques*, pour le fait de *Pierre* mon débiteur, *Jacques* s'est obligé envers moi purement et simplement, par un acte, à me payer la somme de mille livres qui m'est due par *Pierre*, et pour laquelle j'ai fait arrêt, sans qu'il ait été ajouté, comme dans l'espèce ci-dessus, que j'ai bien voulu, pour faire plaisir à *Pierre*, me contenter de l'obligation de *Jacques*, ou quelque autre chose semblable, qui fera connaître évidemment que j'ai voulu décharger *Pierre*, je ne serai point censé avoir fait de novation, et *Jacques* sera censé avoir accédé à l'obligation de *Pierre*, qui demeure toujours mon obligé. The case of *Walton v. Beauregard*, 1 Rob. 301, is clearly distinguishable from the present. There the creditor, without the consent of the original debtor, made stipulations for delay, and entered into arrangements with him which were considered by the court as making the contract more onerous.

The gross proceeds of the judicial sale of the mortgaged property effected in the hypothecary action brought by *Jacobs* against *Caderwood*, were \$666 66. The question is presented, whether that money is to be imputed to the first note, or proportionally to both.

The decree of seizure and sale directed that the property should be sold for so much cash as would pay the first note, and the residue of the price on a credit so as to meet the falling due of the second note. As *Jacobs* was the holder of

both notes, if the property had been sold before the maturity of the second note, the law, as against *Calderwood*, who was not a party to the suit, would perhaps have imputed the proceeds of the sheriff's sale to the first note exclusively. C. C. 2162. But when the sale was made and the money received, both notes had matured, and, being of like nature and dignity, were to be paid proportionally out of the fund. The sheriff's return credits the amount upon the execution, which followed the terms of the decree. Whether this be construed, or not, as an implied imputation of the proceeds to the first note, is immaterial. *Calderwood* did not assent to, and was not bound by, any other than the legal imputation.

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v.  
CALDERWOOD.

A portion of the first note having been thus paid, the question remains, whether the residue is barred by prescription. The note fell due in March, 1842. The present suit was brought in January, 1848. In the intermediate period, no proceedings whatever were had against *Calderwood*, nor is there any evidence of any acknowledgement by him.

We consider it clear that, the hypothecary proceeding against the mortgaged property in the hands of *Hanna*, did not interrupt the prescription as to the personal liability of *Calderwood*. See Troplong, Presc'n. §658, 659, and note. It is equally clear that, the partial payment, made through the judicial sale already mentioned, was not an interruption as to *Calderwood*. A debtor who makes a payment is considered as interrupting the prescription which is running in his favor, because it is an implied acknowledgment of the creditor's right. But such an acknowledgment cannot be predicated in case of a payment made, not by the debtor, but without his knowledge or participation, and through a judicial proceeding to which he was not a party.

The plaintiff is entitled to recover the unpaid balance of the second note.

It is, therefore, decreed that, the judgment of the court below, so far as concerns the note sued upon, due 1-4 March, 1843, be reversed; and it is further decreed that, the plaintiff, *Samuel Jacobs*, for the use of *George W. Copley*, recover of the defendant, *John Calderwood*, the sum of \$562 73, with interest thereon at the rate of ten per cent per annum from the 6th day of January, 1844, until paid, and costs in both courts.

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### CANAL AND BANKING COMPANY v. GRAYSON et al.

Defendants who had, with others, signed a letter addressed to a judge of probates, stating that those who signed the letter would become the sureties of a third person, in case he should be appointed administrator of a particular succession, cannot be held liable as sureties, though such third person was appointed administrator, where a bond was taken for the discharge of his duties, signed by other persons, and not by the defendants.

**A**PPEAL from the District Court of Catahoulas, *Barry, J. M'Guire* and *Ray*, for the plaintiffs. *Purvis, Phelps*, and *R. W. Richardson*, for appellants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal from a judgment rendered against *Grayson & Lovelace*, who are the appellants, at the suit of certain creditors of *Thomas Bryan*, deceased, on the ground that the appellants were sureties of *P. Austin*, who was the administrator of the succession. They were not parties to the bond given by the administrator, but have been held liable by virtue of a letter addressed and delivered to the late judge of the parish of Catahoulas, by whom

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the administrator was appointed, the purport of the letter being that, if *Austin* should be appointed administrator of the succession of *Bryan*, the appellants, and seven other subscribers to the letter, would be his sureties. Four of the subscribers, with two other persons, became the sureties of the administrator.

It is not easy to discover a single legal principle on which the appellants can be, in any sense, held to be the sureties of the administrator. The proposition to the judge, before his judgment was rendered appointing the administrator, can not be heard in a court of justice without a violation of rules which are elementary. See the decision of this court in the case of *Taylor v. Jones*, 3 An. 621.\*

The judgment of the District Court is therefore reversed, and judgment rendered for the defendants, with costs in both courts.

### COPLEY v. RICHARDSON.

Where there has been a settlement of partnership affairs to a certain date, and one partner executes his note in favor of the other for an amount due to the latter, he cannot require a final settlement of the partnership before paying the note thus given.

Where a party binds himself to the holder of a note to pay the amount in case he cannot get it out of the maker, the return of the sheriff on a *f. fa.* against the maker, "that having made diligent search and enquiry, and no property being found in this parish, it is returned *nulla bona*," will not suffice to authorize a judgment against the surety. *Per Cur*: The law makes it the duty of the sheriff to call upon the defendant to point out property, and, in case he is unsuccessful, to call upon the plaintiff to do the same thing. Here no such request was made from either, and, *non constat*, that the judgment would not have been paid if a demand had been made of the defendant.

**A** PPEAL from the District Court of Ouachita, *Barry, J. Copley*, appellant, *pro se. Richardson*, defendant, *pro se.* The judgment of the court was pronounced by

Rost, J. The plaintiff sued the defendant on a due bill for \$205 87, bearing interest at the rate of ten per cent per annum, from 23 of September, 1842. The defendant set up in reconvention the following claims: 1. A claim of \$117 40, under a written obligation of the plaintiff, bearing date 20 of February 1844. 2. A claim for \$200, with interest at the rate of ten per cent per annum, from the 1 of March, 1841, till paid, alleged to be the amount of *Thomas L. Norris'* note in favor of the plaintiff, dated the 1st of June 1840, due on the 1st of March, 1841, with interest as stated, which note the plaintiff bound himself to *Henry C. McEnery*, the holder of it, to pay, in case the amount thereof could not be made out of *Morris*, of which obligation the defendant avers he is the owner by regular transfer and assignment. The District Court allowed the claims of both parties, and gave judgment in favor of the defendant in reconvention, for the balance in his favor. The plaintiff has appealed.

The plaintiff opposes the allowance of the first claim in compensation, on the ground that it originated in, and is connected with the partnership affairs of

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\*The letter containing the proposition to the judge is not marked as having been filed among the records; but it was found among the papers of the succession. The signers proposed to become the sureties of *Austin*, in case he got "the appointment of administrator of *Thos. Bryan*, deceased." *Austin* was appointed "administrator of the succession of *Thomas Bryan* and *Melinda Bryan*, deceased," and the bond actually signed was for his faithful performance of all his duties "as administrator of the succession of *Thomas Bryan* and *Melinda Bryan*."

*Copley & Richardson*, of which there has been no final settlement. There have been several partial settlements of the affairs of this partnership: one on the 20 February, 1844, the date of the plaintiff's obligation in favor of the defendant.

COPLEY  
v.  
RICHARDSON.

When there is a settlement of partnership affairs to a certain date, and one partner executes his note in favor of the other, for an amount due him, he cannot require a final settlement of all the affairs of the partnership before paying the note thus given. 11 La. 293. The plaintiff expressly bound himself to give credit for the amount of the note he gave, on such notes as he held of the defendant's, which the said defendant might acknowledge as correct. We are satisfied that this credit was properly allowed.

The appellant opposes the second claim, on the ground that the defendant has failed to show due diligence on the part of *McEnergy*, in attempting to collect the amount of it from *Norris*. The agreement of *Copley* was to pay the amount, provided *McEnergy* could not get payment out of the maker, *Norris*, it being well understood that he was only to be responsible in the event of the insolvency of *Norris*, and after *McEnergy* should have taken all steps to collect the money of him by suit and execution. *McEnergy* obtained against *Norris* a judgment, upon which execution issued, and the return of the sheriff on that execution is as follows: "Rec'd 2nd February, 1842, and having made diligent search and inquiry, and no property being found in this parish whereon to levy this writ, it is returned *nulla bona*."

The law makes it the duty of the sheriff to call upon the defendant to point out property, and, in case he is unsuccessful, to call upon the plaintiff to do the same. Here no such request was made by the sheriff from either, and, *non constat*, that the judgment would not have been paid if a demand had been made from the defendant. The return of the sheriff is not a compliance with the condition on which *Copley* bound himself, and this portion of the reconventional demand of the defendant must be dismissed.

It is, therefore, ordered that the judgment in this case be reversed, and that the plaintiff recover from the defendant, the sum of one hundred and seventeen dollars and fifty four cents, with interest at the rate of ten per cent per annum from the 20th February 1844, till paid. It is further ordered that there be judgments of nonsuit against the defendant upon his claim against the plaintiff on the *Norris* debt, and that he pay the costs in both courts.

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### LONGINO v. BLACKSTONE.

Proof that a judgment of separation of property had been obtained by a married woman against her husband, will not authorize a judgment against her personally for a debt contracted by her since the judgment of separation. *Per Cur*: A separation of property, though decreed, if not executed by payment of the rights and claims of the wife as far as the estate of the husband can pay them, made to appear by an authentic act, or by a *bona fide* uninterrupted suit to obtain payment, is null. C. C. 2402.

**A**PPEAL from the District Court of Franklin, *Barry, J. Purvis*, for the plaintiff. *Phelps*, for the appellant. The judgment of the court was pronounced by



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v.  
BLACKSTONE.

ROST, J. The plaintiff sues on two promissory notes, which he alleges were made by *Susannah Blackstone* and others, *in solido*, for an improvement upon public land; and further avers that the said *Susannah* was at the time separated in property from her husband, and authorized to bind herself as a feme sole. Judgment was rendered in his favor against her, and she appealed.

Besides other grounds of defence, which it is not necessary to notice, the defendant alleges that her husband, *P. M. Blackstone*, signed her name to the notes, without her approbation; that, so far as she acted in the transaction, she was the passive instrument of her husband's will; that all she did was done under marital authority, and created no personal obligation on her part. Her answer also contains a general denial.

To prove the separation of property, the plaintiff propounded to her the following interrogatory:

Did you bring a suit for separation of property between you and your husband, *P. M. Blackstone*, when you lived in the parish of Catahoula, and did the district court decree a separation, and do you hold the negroes and other property which you have now, as your own separate property?

The defendant failed to answer this interrogatory; and it was ordered by the court to be taken for confessed.

The evidence thus obtained is not sufficient to authorize a judgment against the defendant personally. A separation of property, although decreed by a court of justice, is null, if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment. C. C. 2402. Nothing of this kind is shown to have been done; nor does it appear that the defendant ever had any property entitling her to a judgment of separation.

It is, therefore, ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

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### MITCHELL v. LAY.

Where, in an action to enjoin a *fi. fa.*, an appeal is granted to the defendant, on motion and in general terms, it must be considered as embracing not only the plaintiff, but also the sureties in the injunction bond, who, by a fiction of law (Stat of 25 March, 1831 s. 3,) are considered as plaintiffs in the injunction.

Where an appeal is granted on motion in open court, no citation is necessary.

A motion to dismiss an appeal, taken by the defendant from a judgment rendered in an action enjoining an execution, on the ground that the principal in the injunction bond was the only obligee in the appeal bond, must be made within three days after the record is filed.

**R**EHEARING as to the sureties on the injunction bond. See first part of this case, 3 An. 593.

*Garrett*, for the plaintiff. *McGuire* and *Ray*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The order of appeal was granted upon motion, and in general terms. It must be considered as embracing not only the plaintiff in the cause, but also the sureties in the injunction bond, who, by a fiction of law (Statute of 1831,) are parties plaintiffs in the injunction. The appeal being ordered upon motion, the sureties are to be considered as having been cited as appellees. Act

of 1843, p. 40. *Isabella v. Picot*, 2 An. 390. If the appeal bond was informal in naming their principal only as obligee, upon which point we express no opinion, it was an informality which should have been suggested at an earlier day, and cannot now be noticed, See *O'Reilly v. McLeod*, 2 An. 138.

It is, therefore, ordered that, the decree against the sureties, *Ryan* and *Newburger*, remain undisturbed.

MITCHELL  
v.  
LAY.

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### THE STATE v. WOOTEN.

Where a bond entered into by a prisoner and his sureties, under the stat. of 11 March, 1837, s. 1, for the appearance of the principal at a term of court, does not describe the offence committed, nor that for which the party is bound to answer, the condition being merely for his appearance at a term of court and remaining there until discharged, no judgment can be rendered against the parties to the bond.

**A**PPEAL from the District Court of Morehouse, *Copley, J. Sharp*, district attorney, for the State. *Dubose*, for the appellant. The judgment of the court was pronounced by

**EUSTIS, C. J.** This is an appeal taken by the defendant from a judgment of the Twelfth District Court, sitting in the parish of Morehouse, rendered on motion, under the act of 1837, on a bond entered into by the defendant and his sureties, for the appearance of the former at a term of said court next ensuing after the execution of the bond.

The act under which these proceedings have been conducted, places bonds and recognizances upon the same footing; and this court has more than once held that, there are certain forms to be observed in both which are essential to recovery on them under the law,

The bond is without any endorsement of filing in court, or return from the magistrate or officer, or any note or word of the manner in which it is taken. It is executed in favor of the Governor of the State and his successors in office. It does not describe the offence committed, nor that for which the party is bound to answer, the condition being merely for his appearance at the next term of the court, and remaining there until discharged.

In the case of the *Commonwealth v. Daggett*, 11 Mass. 447, it was held essential to a recognizance for the appearance of a party to answer a criminal charge, that the recognizance contain the cause of taking it; and, in the case of the *State v. Jones*, 3 An. 9, it was held that, no judgment could be rendered under this act on a bond, in which the charge recited did not constitute an offence against the laws. See also the *State v. Cooper*, 3 An. 225.

The motion to dismiss this appeal we do not think tenable.

It is, therefore, decreed that, the judgment appealed from be reversed. and that the State take nothing by its motion.

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### DAWSON v. HEADEN.

A plaintiff in a possessory action, who does not claim either as owner, or with the consent of the owner, must show that he was in actual possession of the land claimed when the eviction complained of occurred.

DAWSON  
v.  
HEADEN.

**A**PPEAL from the District Court of Morehouse, *Copely, J. Dabose*, for the plaintiff. *Robertson and Boatner*, for the appellant. The judgment of the court was pronounced by

Rost, J. This is a possessory action, in which the plaintiff alleges that he has been evicted by force. He applied for, and obtained, an order of the district court enjoining the defendant not to proceed any farther upon his property, by working or making any improvements thereon, till the further order of the court.

The answer of the defendant is a general denial, and an allegation that he has never done any work, nor improved upon any land, except that of which he is the lawful possessor to the knowledge of the plaintiff. The case was tried before a jury, who returned a verdict in favor of the plaintiff; and the defendant has appealed from the judgment rendered thereon.

It is not pretended that the plaintiff possesses under a title, either as owner, or with the consent of the owner; he must, therefore, show that, he was in actual possession of the land he claims when the violence and eviction complained of are alleged to have taken place.

The evidence shows that, in 1845, the plaintiff settled at the place where he now resides, built a cabin, and enclosed a small field. This settlement was near a spring branch, on the other side of which the defendant then lived, and had also enclosed a few acres of land. The land in controversy is that through which the branch runs, and is situated between the two enclosures. It appears that, the defendant commenced making a fence, for the purpose of enclosing a portion of this land. The plaintiff having discovered this on a Sunday morning, took a portion of the rails off the fence around this lot, and laid the worm of a fence crossing the branch and passing over part of the land which the defendant intended to occupy. On the same day, the defendant continued to lay down his fence, crossing the worm of the plaintiff at the gaps which had been left where it crossed the branch. On Monday following, the sheriff served the process in this suit. The line of fence laid by the plaintiff had then large gaps, and went over logs and brush; and, in order to make a fence, it would have been necessary to take up the rails and lay them down again. This line of fence, besides, stopped, and did not enclose any thing.

The plaintiff has totally failed to prove the fact of possession, and the disturbance of which he complains. Neither he, nor the defendant, had then acquired to the land in controversy any right upon which the judgment of the court can be based.

It is, therefore, ordered that, the judgment in this case be reversed; it is further ordered that, the injunction sued out by the plaintiff be dissolved, and that the plaintiff's action be dismissed, with costs in both courts.

### THE STATE v. MORRIS.

**A**PPEAL from the District Court of Catahoula, *Barry, J. Sharp*, district attorney, for the State. *Phelps and Purvis*, for the appellant. The judgment of the court was pronounced by

Eustis, C. J. This is an appeal from a conviction of the appellant for manslaughter. The case has been argued on the motion taken by the counsel for the prisoner in arrest of judgment. The objections taken to the validity of the indictment do not appear to us to be supported by authority; on the contrary,

the authorities referred to in the brief of the district attorney fully sustain the decision of the District Court. The points on which it is made not being new, but familiar to the profession, it is not deemed necessary further to notice them.

STATE  
v.  
MORRIS.

*Judgment affirmed.*

PARGOUD v. BREARD, Administratrix.

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Where, in an action for money against a succession, the testimony of the witnesses is not reduced to writing and annexed to the record, and no list is made of such documents as were produced by the parties and not annexed to the record, the appellee may require the case to be remanded.

The prosecution of a claim for money against a succession is exclusively a probate proceeding. C. P. 924, §13.

**A**PPEAL from the District Court of Ouachita, *Copley, J. McGuire and Ray*, for the plaintiff. *Sharp and Baker*, for the appellant. The judgment of the court was pronounced by

ROST, J. This is a suit against the administratrix of the succession of *Breard*, upon an obligation subscribed by him to the plaintiff. *William Maconchy*, representing himself to be the agent of the administratrix, acknowledged service of the petition. He then failed to answer, and a judgment by default was taken against the succession, and, after the legal delay, made final for the balance claimed and interest. When the administratrix was apprized of this proceeding she took the present appeal.

The certificate of the clerk is not sufficient to enable us to examine the case on its merits; but the appellant contends that, she cannot be prejudiced by the this informality. Her counsel urges that this was a probate proceeding, in which, under article 1042 of the Code of Practice, it was necessary to take the testimony of the witnesses in writing, and to make and file in the record a list of all the documents produced by the parties; and that this not having been done, she is entitled to have the case remanded, under the authority of *Tompkins & Wife v. Benjamin, Tutor*, 16 La. 197; *Graham's Heirs v. Graham's Administrator*, 16 La. 201; *Desormes v. Desormes' Syndic*, 17 La. 115; and the *Succession of Reeves*, 3 An. 554.

We are of opinion that this ground of defence must be sustained. The prosecution of a claim for money against a succession is exclusively a probate proceeding. C. P. 924, §13.

It is urged in behalf of the plaintiff that, this claim had been acknowledged by the administratrix; but this is denied, and the action of the plaintiff rests upon the presumption that it had not been acknowledged.

It is ordered that the judgment in this case be reversed, and the case remanded for further proceedings according to law, with directions to the District Judge to allow the defendant to plead to the merits. It is further ordered that, the costs of this appeal be paid by the plaintiff and appellee.

TUTORSHIP OF BETIN et al.

Decision in *Pargoud v. Breard*, supra, affirmed.

TUTORSHIP OF  
BETIN.

**A**PPEAL from the District Court of Ouachita, *Copley, J. Richardson*, for the appellants. No counsel appeared on the other side. The judgment of the court was pronounced by

ROST, J. This is a probate proceeding in which the testimony taken in the court below was not reduced to writing and annexed to the record, and in which, further, no list of the documents offered in evidence was made out as required by art. 1042 of the Code of Practice. The appellants ask that the cause be remanded, and, under the view taken in the case of *Pargoud v. Breard*, just determined, their application must be granted.

The judgment is therefore reversed, and the case remanded for further proceedings according to law, with leave to the appellants to file oppositions to the account rendered by the defendant. It is further ordered that the costs of this appeal be paid by the defendant and appellee.

### SANDERS v. HUEY.

The evidence of an attorney, in whose hands a note had been placed for collection, is admissible, for the purpose of preventing a double credit for the same payment, to prove that a credit endorsed on the note was written by himself, and that it was intended to be for the proceeds of certain property of the maker, which had been sold to make a payment on account, although the matter was not within his personal knowledge. *Per Cur*: The evidence does not contradict nor vary the written credit, but merely goes to show its origin and the motive of the party doing the act. The information of the attorney was secondary, and probably derived from his client; but to reject his statement on the ground of hearsay, would be a misapplication of the rule.

**A**PPEAL from the District Court of Jackson, *Copley, J. R. W. Richardson*, for the plaintiff. *McGuire* and *Ray*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. One of the defendant's notes exhibits the following endorsement: "This note is entitled to a credit of one hundred and forty six dollars, this 20th August, 1848." The credit was acknowledged in the plaintiff's petition, but without stating its origin. At the trial of the cause testimony was adduced by the defendant to prove the delivery of certain cotton by the defendant to *Colvin*, the payee of the note, and the right of the defendant to be credited with its value. In order to prevent the allowance to the defendant of a double credit for the same item, the plaintiff offered the testimony of his attorney to prove that the credit endorsed on the note was for the cotton delivered by the defendant; that he, the witness, had himself written the credit upon the note, believing it to be the just credit for the cotton, although the matter was not within his personal knowledge. We see no objection to the admissibility of the evidence. It did not contradict nor vary the written credit, but merely went to show its origin and the contemporaneous motive of the party doing the act. It is obvious that the information upon which the attorney acted was secondary. It was probably derived from his client. But to reject his statement on the ground of hearsay, would be a misapplication of the rule which excludes such evidence.

The evidence leaves no doubt upon our minds that the credit endorsed upon the note was for the cotton delivered to the former holder by the defendant, and he is entitled to but one credit for it. The only difficulty upon this branch of

the case is, whether the defendant is entitled to a credit for the nett proceeds of the cotton as shipped and sold by *Colvin* for the defendant's account, or to a credit at a certain price, at which, as the defendant contends, *Colvin* agreed to take it. The evidence on this subject is conflicting, but preponderates in favor of the former hypothesis.

SANDERS  
v.  
HUEY.

We deem it unnecessary to enlarge upon the facts of the case. After a full discussion by counsel, and a careful perusal of the evidence, we are of opinion that, the judgment of the court below has done justice between the parties.

*Judgment affirmed.*

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### HOLLON v. SAPP.

Improvements made upon the public lands of the United States, where the party making them is not in a situation to avail himself of the pre-emption laws, cannot form the object of a contract. The value of improvements so made cannot be recovered from a purchaser of the land from the United States; and, if possession of the land be retained from the latter by the person who made such improvements, damages will be allowed for the detention.

Art. 500 of the Civil Code is not applicable to materials used, nor labor expended, in making settlements on the national domain of the United States.

**A** PPEAL from the District Court of Bossier, *Olcott, J. McGuire and Ray*, for the appellant. *Lawson*, for the defendant. The judgment of the court was pronounced by

ROST, J. The plaintiff purchased from the United States certain quarter sections of land upon which the defendant was then living, and he has brought this action to recover the land so purchased. The defendant does not deny his title, nor does he pretend to have been in a situation to avail himself of the pre-emption laws of the United States; but he alleges that he improved the land in good faith, and asks a judgment in reconvention for the value of his improvements. The judgment was in favor of the plaintiff for the land, and further decreed that he should pay the defendant three hundred dollars for the improvements, before taking possession. From the latter part of the judgment the plaintiff has appealed.

This case does not differ in principle from that of *Jenkins v. Gibbon*, 3 An. 204, in which we held that improvements made upon the public lands, where the party making them is not in a situation to avail himself of the pre-emption laws, cannot form the subject of a contract. The counsel for the defendant controverts the correctness of that decision, and contends that, under article 500 of the Civil Code, the defendant is entitled to recover the value of the materials employed by him, and the cost of the workmanship, even if he were a possessor in bad faith. We are of opinion that this article of the Code is not applicable to materials used, and labor expended, in making settlements on the national domain.

When the State of Louisiana was admitted into the Union the people thereof forever disclaimed all right and title to the waste or unappropriated lands within its limits, and stipulated that the same should be, and remain as they were under the territorial government, at the sole and entire disposition of the United States, free from taxation by the State.

Under this treaty stipulation, the general government has continued to legislate for the preservation, settlement, and gradual alienation of those lands, as it

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did during the existence of the territory, and without opposition from the State. The legislation of Congress on this subject, so far as it is authorized by the treaty, is necessarily exclusive, and subject to no modification or control by local laws. No right can be acquired in relation to the public lands except under the authority of Congress.

The sale of the land in controversy to the plaintiff in this case, fixed the condition of the defendant as a trespasser, and left him without any claim which a court of justice can enforce.

We will allow the plaintiff fifty dollars damages, for the unjust detention of the land by the defendant.

It is therefore ordered that, the judgment in this case be reversed. It is further ordered that the plaintiff recover of the defendant, the south half of the south east quarter of section no. eight, in township no. eighteen, of range no. twelve; and the north east quarter of the north east quarter of section no. seventeen, in township no. eighteen, of range no. twelve. It is further ordered that the plaintiff recover of defendant fifty dollars damages, with the costs in both cases.

### DICK et al. v. GILMER, Administrator, et al.

Where another action is pending before the same tribunal, between the same parties, for the same object, and growing out of the same cause of action, the case must be dismissed, if the exception *litis pendentis* be pleaded. C. C. 335.

**A**PPEAL from the District Court of Caddo, *Olcott, J. Lawson*, for the appellants. *Todd, Gilbert, Crain, and Spofford*, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. We are of opinion that the exception of *litispendence* was properly sustained. The former suit was between the same parties, for the same object, and growing out of the same cause of action. C. C. 335.

We are unable to perceive any force in the suggestion by counsel that, in the issues made in the former suit, the present plaintiffs occupied the position of intervenors. That position was voluntarily assumed by them; *Wolfe* joined issue with them; and a judgment in that suit would form *res judicata* upon the subjects presented now. There is a strong analogy between the pleas of *res judicata* and *litispendence*; and it is a fair test of the present exception to enquire whether, if there were final judgment in the former suit, such judgment would support the plea of *res judicata* in this. *Exceptioni rei judicatæ affinis admodum est exceptio litis pendentis. Voet, De Exceptionibus.*

The exception of *litispendence* rests on a wise public policy. Were it not recognized by the law, the consequences, as is well remarked by *Merlin*, would be not less absurd than dangerous. Suits might be indefinitely multiplied, and the citizen would be exposed to the expense and annoyance of several attacks, at the same time, for the same matter. The simplicity and uniformity which should reign in the administration of justice, might be superseded by the confusion and contradiction of different proceedings and judgments upon the same subject.

*Judgment affirmed.\**

\* A similar judgment, for the same reasons, was rendered at the same term, in the case of *Beirne et al.*, against the same defendants. R.

## COPLEY v. SNOW.

Where interrogatories propounded by a plaintiff to a garnishee do not disclose the amount of plaintiff's judgment, and it is not shown to have been otherwise notified to the garnishee, judgment cannot be rendered against him, on his failure to answer, for the amount of plaintiff's judgment.

Where a plaintiff, by whom interrogatories had been propounded to a garnishee, after a written motion to have them taken for confessed, goes to trial upon the merits, without requiring the action of the court upon his motion, and permits the garnishee to offer his answers in evidence, without excepting to their being received, the answers must be considered as uncontradicted, and judgment may be rendered in accordance therewith.

**A** PPEAL from the District Court of Caldwell, *Barry, J. Parvis*, for the appellant. *McGuire and Ray*, for the garnishee. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff, having obtained a judgment against *Snow* and issued execution, propounded interrogatories to *Bres*, as garnishee. After the lapse of the time designated in the citation, the plaintiff obtained an order that the interrogatories be taken as confessed, and judgment against the garnishee. Upon motion for a new trial, accompanied by answers to the interrogatories, the judgment was set aside. The cause being afterwards heard upon the merits, there was judgment in favor of the garnishee, from which the plaintiff has appealed.

It is said that the court erred in setting aside the judgment against the garnishee, and in permitting him to file his answers to the interrogatories. Whether, under ordinary circumstances, the neglect of the garnishee would have been irremediable, it is unnecessary to decide. The judgment which condemns the garnishee was clearly erroneous; because the interrogatories did not disclose the amount of the plaintiff's judgment against *Snow*, nor had it been otherwise notified to him.

After the answers were filed, the plaintiff filed a written application that the interrogatories might be taken as confessed, upon the ground that, the answers were not specific, but uncertain and insufficient. Subsequently the cause was continued from time to time, and was at length, as it would seem, tried upon the merits, the plaintiff offering in evidence portions of the proceedings in the cause, and the garnishee his answers to interrogatories, to the introduction of which in evidence no exception was taken. These answers deny any indebtedness to *Snow*. The interrogatories were propounded in general terms, and the answers were expressed in a similar manner.

We are not prepared to say that, the plaintiff was entitled to a more detailed account of the transactions of *Bres* with *Snow* in answer to the interrogatories as propounded. But if he were, he should, instead of going to trial upon the merits, have required the action of the court upon the motion already noticed, which does not appear to have been notified to the garnishee, nor passed upon by the court; or he should have excepted to the introduction of the answers in evidence. Standing uncontradicted, they justify the judgment rendered in favor of the garnishee.

*Judgment affirmed.*



## SUCCESSION OF WELLS.

Where a resident of another State, who dies here without having acquired a domicil, leaves a testament executed in the State in which he resided, the effect of such testament upon slaves and moveables in his possession in this State at the time of his death, must depend upon the jurisprudence of the State in which the testament was executed.

**A**PPEAL from the District Court of Caddo, *Olcott, J. J. W. Jones*, for the absent heirs, appellants. *Spofford*, on the same side. *Terrell, Hodg. Gilbert and Landrum*, for the curator. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal from a decree of the District Court, sitting in the parish of Caddo, by which the will of the deceased, *Bannister Wells*, was admitted to probate, and ordered to be executed; and *Mary Wells*, the surviving wife of the deceased, was recognized as exclusive owner of the slaves and personal property of which the deceased died possessed, and which were in the hands of *Joel U. Hardwick*, who was the administrator of the succession. The decree further directed, that she be put in possession of said property, and that the administrator account to the said *Mary Wells*, within twenty days from the signing thereof. It would appear that those proceedings were conducted contradictorily with the administrator and the attorney appointed to represent the absent heirs; the latter has taken this appeal.

A bill of exceptions was taken by the appellant to the decision of the district judge in compelling the trial and another as to the mode of conducting the argument; neither of which we deem it material to notice.

The will appears to have been executed in 1843, in the State of Mississippi; the deceased died in the parish of Caddo, in February, 1849, and, before leaving Mississippi,\* he made a division of property with his wife, who remained at home, reserving to himself nothing but the property which he took with him in his journey of migration, during which he died.

The deceased had not changed his original domicil in Mississippi, having acquired no other; and the effect of the will upon the property of which he died possessed, to wit, slaves and moveables, and also that of the entire change in his property, on his departure for another residence, upon the will previously made, are matters which depend upon the jurisprudence of Mississippi.

Upon these questions, the evidence of counsel learned in the law ought to have been furnished. Without such assistance, we do not feel ourselves at liberty to decide them. The trial was had in the court below, without any sufficient preparation, and bears evident marks of precipitancy. The case involves questions of difficulty, at least, to us; and we are not permitted to close it upon the showing which the surviving wife has made. The heirs of the husband do not appear to have been recognized—three only, his sisters, having presented themselves, and claimed their rights; and it is not alleged that they are his sole heirs.

It is, therefore, decreed, that the judgment appealed from be annulled, and the case remanded for further proceedings, according to law; the costs of this appeal to be borne by the appellee.

\* In January, 1849.

## BAILEY v. MORRISON.

|    |      |     |
|----|------|-----|
| C. | 4    | 523 |
| 47 | 44   |     |
| 47 | 100  |     |
| 4  | 523  |     |
| 48 | 1244 |     |

The natural tutrix of a minor child may emigrate to another State of the Union, and take her infant child with her.

Although a natural tutrix who marries, without being authorized by the judge on the advice of a family meeting to retain the tutorship, will lose it, yet she may be subsequently appointed, as any other person, dative tutrix; and where the tutorship was forfeited by the marriage of the tutrix in another State, to which she had emigrated, she may be there appointed guardian of the minor, and will stand in the position of any other guardian of a minor appointed in the State to which she had removed; and under the stat. of 1 April, 1843. she may, on proof of her appointment, without qualifying as tutrix here under our laws, compel one who had been subsequently appointed tutor to the minor by a court of this State, to account; and, where it is shown that the debts of the succession through which the property descended to the minor have been paid, she may receive the funds in his hands, and take possession of the immovables.

Lands of a minor, situated in this State, cannot be sold though at the instance of a foreign tutor, without the advice of a family meeting. Such a tutor has full power to administer by an attorney in fact, the real property of his pupil situated in this State; but the rules regulating the alienation of the real property of minors are uniform, and independent of the tutor's domicile.

Sec. 2 of the stat. of 1 April, 1843, allowing any tutor or guardian, appointed in another State of the Union, to remove the property of his pupil from this State, applies to cases in which the estate of the minor has been converted into money; but does not authorize the sale of real property belonging to the minor situated here, without the advice of a family meeting.

**A** PPEAL from the District Court of Ouachita, *Copley, J. Sharp*, for the plaintiff. *Purvis*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiff, *Adeline Tufts*, was married to *Jno. Dowell*, in the parish of Ounchita, in November, 1840. In 1843 *Dowell* died, leaving *Henry Elbridge Dowell*, his son, the only issue by his marriage with the plaintiff. A few days after his death, the plaintiff was confirmed as natural tutrix to the minor. She removed soon after to her mother's residence in Massachusetts, and took her son with her. She resided there until the fall of 1847, when she intermarried with her present husband, *Joseph Bailey*, and removed with him to his residence in Connecticut, and is permanently settled there with the minor.

The plaintiff contracted this marriage without having been authorised by a family meeting to retain the tutorship; she was therefore, *ipso facto*, deprived of it; and the defendant, who is a relation of the minor, caused himself to be appointed by the judge on the advice of a family meeting, and took possession of the minor's estate.

On the 23 March, 1849, the plaintiff presented a petition to the Court of Probates for the district of Groton, in the State of Connecticut, where she resides, representing that her minor son had inherited an estate in Louisiana, which she desired to remove to Connecticut; she asked to be appointed guardian, and offered to give bond for the safe administration of that estate. She accordingly gave bond in the sum of \$5,000, and was appointed. This proceeding was had under the authority of the case of *Fisk v. Fisk*, 2 An. 71.

The plaintiff represents that the defendant is in the possession of her son's estate; she prays that she may be recognized as guardian; that the defendant

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v.  
MORRISON.

may be ordered to render an account, and to pay over to her the funds in his hands. She finally asks for a decree of court to sell the land belonging to the minor, in order that she may remove the proceeds to Connecticut.

The defence is, that the plaintiff has been deprived of the tutorship, and could not be legally re-appointed; that if she could, she must give bond here as other tutors; that guardians appointed in the other States have no right to interfere with tutors appointed under the laws of this State; that much of the property of the minor is immovable, and cannot be taken care of by a guardian residing out of the State; that this land produces fruits, and the sale of it at this time would work an irreparable injury to the minor.

There was judgment in favor of the plaintiff, recognizing her as guardian, and ordering the defendant to account to her for the money in his hands. The court being further of opinion that, the other points raised by the pleadings could not be determined in the present action, reserved the rights of the parties in relation thereto. The defendant has appealed; and the plaintiff asks that the judgment be amended in her favor, so as to authorize her to sell the land without the intervention of a family meeting, and to remove the proceeds to the State of Connecticut.

The plaintiff has, we think, made out a case of *bonâ fide* removal to another State; and there is no doubt that she had the right so to emigrate, and to take her infant child with her. Story's Conflict of Laws, p. 505. 9 Mart. 543. 4 Mart. 715. 7 La. 543.

Although the plaintiff lost the tutorship by marrying without being authorized by the judge, on the advice of a family meeting, to retain it, she might subsequently have been appointed dative tutrix, as any other person. This constitutes no objection to her appointment in Connecticut. See Merlin's Rep. *verbo* Tutelle, §3, art. 3. 2 Duranton, no. 427. *Robins v. Wells*, 5 N. S. 382.

It may therefore be conceded that the plaintiff, under her appointment, stands in the same situation as the foreign guardian of a minor born in the State of Connecticut, and inheriting property in Louisiana.

The 1st section of the act of 1843, provides: "That hereafter, any person who has been, or shall be, appointed tutor or guardian of any minor residing out of the State of Louisiana, but within the United States, and who has qualified as such, in conformity with the laws of the State where said appointment is made, shall be entitled to sue for, and recover, any property, rights, or credits, belonging to said minor, within this State, upon his producing satisfactory evidence of his appointment as aforesaid, without being under the necessity of qualifying as tutor of said minor, under the laws of Louisiana."

Under this provision of law there can be no doubt of the right of the plaintiff to compel the defendant to account; and, as it is satisfactorily shown that the debts of the succession through which this property descended to the minor have all been paid, she is entitled to receive the funds in the hands of the defendant, and to take possession of the immovable property. We are, therefore, of opinion that there is nothing in the judgment of which the defendant can complain.

We are further of opinion that the judge did not err, in refusing to order the sale of the lands of the minor without the advice of a family meeting. There is no law to authorize such a proceeding. A foreign tutor has full power to administer the real property of his ward, situated in this State, by an attorney in fact. *Chiapella v. Couprey*, 8 La. 88. If he neglects to do so, it is made the

duty of the courts of this State to appoint a tutor *ad bona*, for that purpose; but the rules regulating the alienation of the real property of minors are uniform, and independent of the tutor's domicile.

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v.  
MORRISON.

The 2nd section of the act of 1843, allowing the tutor to remove the property of the minor from the State, applies to cases in which the estate of the minor has been converted into money, and does not authorize the sale of real estate in the manner prayed for.

*Judgment affirmed.*

### SEARS, Administratrix, v. WILLSON et al.

Where no petition and citation of appeal have been served on the appellee, it must appear from the record that the appeal was granted on motion in open court, or it must be dismissed.

**A**PPEAL from the District Court of Morehouse, *Copley, J. M'Guire, Ray, Hunter, and Mathews*, for the plaintiff. *Baker*, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff, who is the appellee, has moved to dismiss the appeal on the ground that, it does not appear on the record that the appeal was granted on the motion of the appellant in open court, as required by the statute in cases where the appeal is not taken by petition and citation served on the appellee. We deem it indispensable to adhere to the requisitions of the act, which dispenses with the service of the petition and citation of appeal, by providing that parties are held to receive notice of an appeal, by motion being made in open court, where, by a fiction of law, they are supposed to be present during the term at which the judgment was rendered. *St. Avid v. Pichot*, 3 Annual, 9.

The entries on the minutes contain no motion for an appeal. They indicate great irregularity and looseness, and read thus: "Motion for new trial filed. Motion for new trial overruled. Appeal granted. Bond fixed for a suspensive appeal," &c.

The motion to dismiss must prevail.

*Appeal dismissed.*

### ANDERSON v. SMITH et al.

A party who obtained possession of the land in controversy, not as owner, but with the consent and authorization of another, cannot maintain a possessory action against the latter.

Parol evidence of third persons of a verbal contract to sell land, will not support an action for specific performance, nor for damages.

**A**PPEAL from the District Court of Jackson, *Copley, J. M'Guire, and Ray*, for the plaintiff. *Stillman and Collinsworth*, for the appellant. The judgment of the court was pronounced by

ROST, J. The plaintiff alleges that he is the owner of eight superficial acres of land, which the defendants illegally withhold from him. He asks to be put in possession of the land, and prays for damages.

ANDERSON  
v.  
SMITH.

One of the defendants has disclaimed all right to the land. The answer of the other is that, he is in possession, since 1845, with the knowledge and consent of the plaintiff; that the said plaintiff made a verbal contract with him, to convey to him sixty acres of land, including the eight acres in controversy, as soon as the mortgage then existing upon said land was raised, and that he went into possession under that agreement; and that the plaintiff fraudulently refuses to execute said contract. The defendant prays that the plaintiff be adjudged to execute this contract, and to pay him damages. The case was tried before a jury, and judgment rendered on the verdict, in favor of the plaintiff, for the land, and \$48 damages. The defendant appealed.

The ground on which the appellant mainly relies for the reversal of the judgment is that, this is a possessory action; and that, as he had been in actual possession more than one year when it was commenced, the judgment should have been in his favor.

Whether the action be petitory, or, as alleged, possessory, is immaterial, under the pleas set up. The defendant has alleged in his answer, and has proved on the trial, that he went into possession of the land in controversy with the consent and authorization of the plaintiff, and holds under him. He did not, therefore, possess as owner, and could not have maintained a possessory action.

In the case of *Marionneaux v. Edwards*, 4 An. 103, we held that no action, either for a specific performance, or for damages, would lie on a verbal contract to sell land. This decision, with which we have no reason to be dissatisfied, is conclusive against the defendant, so far as his claims for the land and for damages are involved.

The plaintiff has claimed damages for the wrongful detention of his land by the defendant; the jury allowed \$48; and, after perusing the evidence, we are unable to say that they erred.

*Judgment affirmed.*

### Tew v. Labiche et al.

A payment on account made by the maker of a promissory note to a person not in possession of the note, nor authorized by the owner of the note to receive payment, and which was never received by the owner, will not entitle the maker to a credit for its amount.

An agent employed to make or conclude a contract has not, as a matter of course, any incidental authority to receive payments which may become due under it.

Where the title of a holder, before maturity, of a negotiable note, is not affected by any reasonable suspicion, a mere partial failure of consideration between the original parties is not sufficient to throw upon him the burden of showing for what value he became the holder.

**A** PPEAL from the District Court of Catahoula, *Barry, J. Garrett*, for the appellant. *Taliaferro*, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The defendants having taken an order of seizure and sale upon two mortgage notes, the plaintiff obtained an injunction to stay its execution. The proceeding subsequently assumed the form of the *via ordinaria*. The notes are each for the sum of \$2,549 81, dated on the 15th April, 1843, and payable, one on the 1st January, 1845, and the other on the 1st January, 1846. They are both made by the plaintiff, to the order of *Jacques Lastrapes*, and *Louis F. Lastrapes*. The note due 1st January, 1845, was protested at its ma-

turity, at the request, as appears by the notarial protest, of the cashier of the Bank of Louisiana; and it also appears, by the same instrument, that at that time the note bore the blank endorsement of the payees, of *Labiche*, and of *Follain and Bellocq*.

Tew  
v.  
LABICHE.

The prominent question presented in this cause is, whether the plaintiff is entitled to credit, on the note protested 4th January 1845, for a payment made by her, on the 20th February 1845, to *R. Garland*, and which is exhibited by the following receipt:—

“ *New Orleans, February 20th, 1845.*

“ Received of *Mrs. Sarah Y. Tew*, the sum of fifteen hundred dollars, which is to be credited on her note, to *Messrs. Jacques*, and *Louis F. Lastrapes*, for the sum of \$2,549 81, due the 1st January 1845, secured by mortgage, of record in the office of the judge of the parish of Catahoula.

(Signed), *R. GARLAND*,

Atty. in fact of *Jacques* and *Louis F. Lastrapes*.”

It is not disputed, on the one hand, that the receipt is genuine, and that the money was really paid by the plaintiff to *Garland*; nor is it pretended, on the other hand, that *Garland* ever paid the money to the persons whose agent he assumed to be.

It must be conceded, as a general principle of law, that a payment to be valid must be made either to the lawful proprietor of the debt, or to some person authorized by him to receive it. It is also clear that payment to an agent properly authorized, is equivalent to payment to the principal. *Quod jussu alterius solvitur pro eo est quasi ipsi solutum esset*. The question then is, was *Garland* authorized by the lawful proprietors of the note to receive payment; or was he without such authority, and his act consequently void against such proprietor?

Before expressing an opinion on this point, it is necessary to recapitulate briefly the material facts proved at the trial, and which have been considered pertinent by counsel.

*Lastrapes, Desmare & Co.* had obtained a judgment, in the District Court at Catahoula, against *Johnson, Stone*, and others, for \$4,870, with ten per cent interest, from the 24th January 1838. For this debt, the succession of *Robert Fristoe*, opened in the parish of Catahoula, was also bound. Some time previous to the 15th April 1843, *Lastrapes, Desmare & Co.* had transferred this judgment to *J. Lastrapes* and *L. F. Lastrapes*. On the 19th March 1843, *J.* and *L. F. Lastrapes*, by act under private signature, appointed *Rice Garland*, who was their brother-in-law, “their agent and attorney in fact, to sue for and adjust, settle, compromise, novate and arrange, in any way he may think best, the claims now due us, from *B. E. Johnson, Stone*, the estate of *Fristoe*, and [sued] upon in the name of *L. Lastrapes, Desmare & Co.*, in the District Court held in and for the parish of Catahoula as respects said *Johnson* and *Stone*, and probated in the Probate Court of said parish as respects the estate of said *Robert Fristoe*, and to have full and plenary powers to act in the premises, as our interest, may seem to him to require; and all such actings and doings of our said attorney in fact shall be as obligatory and binding on us, as if transacted by ourselves.”

On the 15th April 1843, *Garland*, acting under this power, and annexing it to the notarial act, transferred to the plaintiff the judgment above mentioned, and all the rights of the judgment creditors therein, with the exception of a twelve-month's bond given in that case, which was to remain in its then situation until paid by the plaintiff; in which case, she was to be fully subrogated to

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the rights of the judgment creditors, the obligees in the bond. This transfer was made in consideration of the sum of \$5,099 63, in payment of which *Mrs. Tew* gave the two promissory notes above mentioned, and executed in the same notarial act, to secure their payment, a mortgage of certain lands and slaves, a portion of which were already encumbered by a mortgage which she had granted in favor of the succession of *Fristoe*. This latter mortgage she covenanted to pay and satisfy with the judgment conveyed to her by *Lastrapes, Desmare & Co.* The plaintiff's mortgage notes were delivered to *Garland*, as is stated in the act.

On the 6th February 1844, *Mrs. Tew* paid to *Garland* the amount of the twelve month's bond above mentioned, which was executed by *G. Mayo* as principal, and by *J. W. Stone* and *Mrs. Tew* as sureties. *Garland* gave her a written receipt for \$1811, as in full for the bond, signing himself attorney in fact for *Lastrapes, Desmare & Co.*; and it is inferrable from the evidence that when he received the payment he had the bond in his possession, and delivered it to her. The bond was produced, and offered in evidence in the court below.

We have already stated that *Garland* received the \$1,500 upon her note, from the plaintiff, on the 20th February 1845. In a letter, subsequently addressed by *Garland* to *Labiche*, the defendant, and which was offered in evidence by the plaintiff, he writes as follows:—

“ *New Orleans, Feb. 22, 1845.*

“ MY DEAR SIR: Yours of the 6th instant was handed to me by *Mr. Urbain*. I have paid him for you \$600, and have his receipt. I understood that the mulatto, *Henry*, was bid off to you at \$700, and I was to have him at that price. You are mistaken in supposing that the sum of \$500 is coming on the amount received by me. It is but little more than half that sum. The amount received from *Madam Tew* on the bond was about \$1750, of which \$850 was paid to *Desmare* for you, and \$600 to *Mr. Urbain*. If you will send down the note of *Madam Tew*, due last January, I can get \$1500 on it, in the course of next month, or in April. *Colonel Tew* was here a few days ago, and has made an arrangement for the money. I told him if that sum was paid soon, indulgence would be given for the balance. I shall be in *Opelousas* between the 10th and 15th of next month, and will settle with you then. Respectfully and truly yours,

“ R. GARLAND.

“ Mr. Pierre Labiche, Opelousas.”

The defendants offered in evidence the testimony of *A. Desmare*, a resident of *New Orleans*, who deposes that he received the plaintiff's note, due 1-4th January 1845, from *Labiche*, in April 1845, accompanied by a letter from *Labiche*, in which he says, that he had informed *Garland* that he had thought of going to the city, but, for fear of being disappointed, he sends *Desmare* the note. He states that there had been a promise to pay \$1500 on account, and urges *Desmare*, if it is paid, to let him know at once. He directs him to ascertain when the debtor can pay the balance, speaks of his own urgent want of funds, and his intention, if the payment on account is not made, to foreclose the mortgage, and buy in the slaves, of which he stands in need. To this letter *Desmare* replied, acknowledging the receipt of the protested note; stating his supposition, that *Garland* would be able to inform him where he should make application for the promised payment. Another letter was also written by *Labiche* to *Desmare*, on the 23d April 1845, in which he says, in substance, that

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he had received a letter from *Garland* informing him that *Mr. Tew* could not come to New Orleans in the middle of April as he had promised, but had promised to come about the end of the month. He requests *Desmare* to see *Garland*, to ask if he could depend on getting a payment, and to say to him that, as he, *Labiche*, could not come to the city himself, he had sent the note to *Desmare* that he might receive the money from *Mr. Tew*, and have the payment endorsed on the note. *Desmare* replies, on the 28th April, as follows:—

“Votre lettre de 22 de ce mois m’est parvenu avant hier par le Panola, mon cher *Labiche* ; j’avais déjà prié notre ami *Garland* de me prévenir aussitôt que *Mr. Tew* serait en ville ; je l’ai revu depuis a ce sujet ; il m’a paru persuadé que ce monsieur serait ici vers la fin du mois, et m’a promis de me faire savoir quand il serait arrivé. Il faut prendre patience et esperer.”

On the 11th December 1846, *J. and L. F. Lastrapes* executed in favor of *Labiche*, in his capacity of tutor, executor, &c., a notarial act of subrogation of the mortgage given by the plaintiff. In this act they declare that, on the 9th May 1843, they had transferred the notes to him, in his said capacities of executor, tutor, &c., in consideration of the sum of \$5099 62, which they acknowledge to have received in cash.

It is admitted by the parties that *Garland* “left New Orleans and fled the country, about the last of November, or first of December, 1845, to avoid a criminal prosecution.”

There are also in evidence two letters, addressed, in June and July 1846, by *Mr. Tew* to *Labiche*, requesting information about *Garland*, and asking copies of letters to *Labiche*, suggesting that they might be useful in case of proceedings against *Garland*, on behalf of *Mrs. Tew*.

It seems to us clear that, so far as *Labiche* is concerned, no authority is shown from him to *Garland*, which would have authorized the latter to obtain a payment on account of the note from the plaintiff, without the production of the note itself. The plaintiff, on this point, did not profess to treat with him as the agent of *Labiche*, but of the *Messieurs Lastrapes* ; and *Labiche*, although he evidently looked to *Garland* for advice and assistance in the matter, did not consider him as having authority to collect the money for him, nor does he appear to have expected that *Mrs. Tew* would pay it to any one without the production of the note. Hence his authorization to *Desmare*, who appears to have been his factor, to receive the money, although *Garland* too was then in New Orleans ; and hence, also, his transmission of the note to *Desmare*. An authorization from *Labiche* cannot be deduced from the collection of the bond in 1844, by *Garland*. Although *Labiche* was evidently interested in the proceeds of the collections, it does not appear that the bond had been transferred to him, nor that he had constituted *Garland* his agent to collect it, *Garland* professed to act on that occasion as the agent of *J. and L. F. Lastrapes* ; and besides would seem to have had the bond in his possession, as we find it went into the plaintiff’s hands ; and the fair inference, in the absence of countervailing circumstances is, that she got the bond when she paid the money.

But it is contended by the plaintiff that *Labiche* is not to be considered as an ordinary holder, for value, before maturity, in the ordinary course of business ; that the plaintiff had charged in her petition that he was not the real owner of the note, that his title was fictitious, and that the transfer to him was a scheme devised by him and *Lastrapes* to defeat the equitable defence ; that, under the pleadings and the circumstances developed by the evidence, the *onus* was thrown



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upon the defendants to make out a clear title to the notes, for a valuable consideration, before maturity; that, not having done so, the defendants must be considered as standing in the place of their endorsers, *J. and L. F. Lastrapes*; and that the payment to *Garland* would be binding upon them, were they the holders.

The evidence, taken as a whole, does not sustain the positions which her counsel assumes. But conceding, for the purposes of argument, that he is right, the case, even upon that hypothesis, is against him.

It is said by a writer of respectable authority that, if money be due upon a written security it is the duty of the debtor, if he pay it to an agent, to see that the person to whom he pays it is in possession of the security. For, though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor. He cites authorities to the effect that, even the agent's being usually employed in the receipt of money does not in this instance constitute such authority as will secure the debtor. It has been so held, in respect to money paid upon a bond to one who usually received money for the obligee, but who had not the custody of the bond in question. So, even where the obligor had for several years paid the interest and part of the principal to an agent of the lender through whom the money had been borrowed, who had not the possession of the bond, but had regularly paid the money over to the obligee, except the last payment, the obligor was adjudged to pay the last sum over again. Mr. Paley, however, observes that perhaps a *special authority* from the obligee might be shown, which would be sufficient without possession of the security. See *Paley on Agency*, 275.

Mr. Chitty, in common with other writers on the subject of bills and notes, declares that it is neither necessary nor prudent to pay a negotiable note to a party who is not the holder, nor without his first producing and delivering up the instrument; and observes that if, for want of distinct evidence of payment, it should be in doubt whether it was made, the mere circumstance of the instrument not having been given up, will afford a presumption against the party who alleges he has paid it.

It seems to be assumed by the plaintiff that the power given by the *Messieurs Lastrapes* to *Garland*, on the 19th March 1843, authorized him to receive the payment in question. In this view we do not concur. We consider that power, the terms of which we have given at length, as covering the settlement novation, and contract generally, made with *Mrs. Tew* on the 15th April 1843, and as expiring when that matter was finished, and the notes payable to the order of *Messieurs Lastrapes* were received by *Garland*, and delivered to his principals. Such is its reasonable interpretation; and we have not the right to strain it beyond its terms. Now, an agent who is employed to make, or negotiate, or conclude a contract, is not, as of course, to be treated as having an incidental authority to receive payments which may become due under such contract. An agent, says Mr. Story, authorized to take a bond, is not to be deemed as of course entitled to receive payments of the money due under the bond. But, if he is entrusted with the continued possession of the bond, an implication of such authority may be deduced from that fact, in connexion with the others. *Story on Agency*, § 98.

The circumstance of *Garland's* receiving payment of the twelve months' bond, has been considered with reference to *Labiche*; and, without repeating what

was then said, we may add that the circumstance is even weaker as against the *Messieurs Lastrapes*. It is not shown that they received any portion of that money, nor even that its collection was brought to their knowledge.

We conclude, therefore, that this court did not err in refusing the plaintiff a credit for the money paid to *Garland*. The loss must fall on the plaintiff; and she must bear the burden of her own imprudence and misplaced confidence.

The plaintiff claims a credit of \$800 upon the ground that, previous to the transfer to her of the judgment, which was the consideration of her notes, that amount had been collected by the transferrors, which was not communicated to her, nor mentioned in the act of transfer. As vendors of the judgment they warranted its existence such as it was described in the deed; and, under the evidence, we should probably reduce the notes *pro tanto*, were the payees plaintiffs here. But, in our opinion, this defence is not available against *Labiche*. He comes before us with the opinion of the district judge in his favor. We cannot say that this opinion was manifestly erroneous. The title of *Labiche*, a holder before maturity, is not under the evidence affected by any reasonable suspicion; and in such case the mere partial failure of consideration between the original parties is not sufficient to throw upon the respondent the burden of shewing for what value he became the holder. See 1 Bingham, N. C. 567. See also Greenleaf, Evid. vol. 2, § 172. *Judgment affirmed.*

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### COPLEY v. HASSON et al.

Where, in an action for slander of title, the petition prays that defendants may be compelled to set forth and establish their titles to the land in dispute, if any they have, and that plaintiff may have judgment for his land, quieting him in his title, and that defendants be prohibited from setting up title to the same, and for damages, the petition cannot be amended by a supplemental answer containing the grounds of a petitory action against the defendants, in which, for the purpose of the action, their possession is conceded. The object of the action of *jactitation* is to protect the ownership of lands from disturbance by slander of the title; but the action has, in no instance, been maintained against a person in possession under a title. The possessory and petitory actions, which are regulated by positive law, give the party injured by the adverse possession every remedy that can be needed.

**A**PPEAL from the District Court of Ouachita, *Barry, J.* *Copley*, appellant, *pro se*. *Purvis*, on the same side. *McGuire* and *Ray*, for the defendants. The judgment of the court was pronounced by

**ESSRIS, C. J.** This is an action of *jactitation*, instituted by the plaintiff against the defendants, who are charged with having, within the last twelve months, pretended to have some title or claim to certain lands described in the petition, and to have slandered the title of the petitioner, to his damage and injury in the sum of \$5,000. The prayer of the petition is, that they be compelled to set forth and establish their title to the lands, if any they have, and that the petitioner have judgment for his lands, quieting him in his title, &c., and that the defendants be enjoined and prohibited from setting up title to the same, and for \$5,000 damages.

The defendants filed an exception to the plaintiff's action, on the ground that the plaintiff did not allege that he was in the actual possession of the lands, nor that the defendants had maliciously slandered his title; they allege that they

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have been for more than two years in actual and undisturbed possession of the lands as owners thereof, except a certain portion, to which they disclaim title. This exception, involving matters of fact as to the possession of the defendants, was referred to the merits, as is stated.

An answer was afterwards filed, in which the general issue was pleaded, and a title set up under a sale for taxes, by which the defendants claim to hold the interest of one *S. P. Day* in said lands, being an undivided moiety thereof, which they allege they possess as owners.

On the day the answer was filed, the plaintiff applied to the court for leave to file a supplemental petition, which the court refused, on the ground that the amended petition changed the nature of the action; to this refusal the plaintiff, who in the court below conducted his cause in person, took a bill of exceptions.

The amended petition contained the grounds of a petitory action against the defendants, in which, for the purpose of the action, their possession was conceded.

It is contended that the court erred in not allowing the amended petition to be filed, and the authorities relied upon in support of this position are *Hoover, Tutor, v. Richard's Executrix*, 1 Rob. 35; and *Haydel v. Bateman*, 2 An. 755. In the first case, the court permitted a party, who had brought a possessory action, to amend, by converting it a petitory action, inasmuch as it benefited the defendant in making him a possessor until defendants should have shown a better title; and the possessory action was thereby renounced. Code of Practice, 54. In the case of *Bateman*, the petition did not disclose whether the action was possessory or petitory, and an amendment making it *clearly* petitory was held to be admissible. Neither of these authorities appear to be applicable to the present case; and, we think, the judge did not err in refusing to allow the amendment.

The defendants pleaded to the merits under reservation of the matters set forth in their exception, and, after evidence was adduced as to the title of each party, and the trial closed, the judge nonsuited the plaintiff, and he has taken this appeal.

The case is before us under the original petition, and the only question before us is, whether the judge decided correctly in nonsuiting the plaintiff in this suit, which is one of jactitation of title exclusively.

The defendants claim the lands under a forced sale for taxes, as the property of *S. P. Day*, in November 1843, the interest of *Day* being an undivided moiety thereof. The plaintiff claims title under a purchase at sheriff's sale, in 1844, made under proceedings against *Day et al.* It does not appear that the plaintiff ever entered into possession of the lands; any possession which he can be considered as having, must result from his title exclusively.

*Hasson*, who must be considered as possessing for himself and his co-proprietor, is in possession of an undivided moiety, and his actual possession, we think, dates back for more than one year from the institution of the plaintiff's suit.

The object of the action of jactitation is, to protect the ownership of lands from disturbance by slander of the title; but we know of no instance in which the action has been maintained against a person in possession under a title. The possessory and petitory actions, which are regulated by positive law, give to the party injured by the adverse possession every remedy which can be needed. We think the judge did not err in nonsuiting the plaintiff, under the authority of the case of *Walden v. Peters*, 2 Rob. 333.

We have so recently given our views on the subject of this action, which we have held to be restricted within narrow limits, that it is only necessary here to refer to the case of *Packwood v. Dorsey*, ante p. 90.

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*Judgment affirmed.*

### WALSH v. CANE, Administratrix.

Where a partnership has been dissolved by the death of one of its members, a surviving partner cannot, by acknowledging a claim against the partnership, which had been extinguished by prescription before its dissolution, revive the debt as against the partnership. Such an acknowledgment can only affect the person by whom it was made.

**A**PPEAL from the District Court of Bossier, *Olcott, J. Lawson, Terrell* and *Hodge*, for the plaintiff. *Spofford* and *Crain*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff's claim is principally for wages, as clerk in the house of *James H. Crane & Co.*, from 1841 to 1846. The principal ground of defence was that, in consideration of the youth and inexperience of the plaintiff he was not entitled to wages, and was sufficiently compensated by receiving his board and lodging, and mercantile instruction, in the shop of his employers.

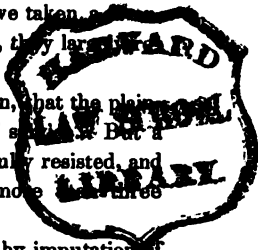
The claim of the plaintiff, as presented by him against the estate of a deceased person, was much larger than under any view of the case he ought to have demanded; and this circumstance has induced us to scrutinize closely the voluminous testimony adduced by him. On the other hand, we are not permitted to overlook the fact that two juries of the vicinage have taken a favorable view of his claim for wages, although, on each occasion, they largely reduced his demand.

The result of our examination of the evidence is the conclusion, that the plaintiff is entitled to wages for at least a portion of his time of service. But a plea of prescription was made, which has not been successfully resisted, and which therefore excludes any claim for services rendered more than three years before the institution of the suit. Civil Code, 3503.

The effort of the plaintiff to escape the plea of prescription, by imputation of certain sums due to him in account current by *J. H. Crane & Co.*, is inconsistent with the entries and balances in the account books made by himself.

The plaintiff relies upon an acknowledgment, said to have been made by one of the commercial firm of *J. H. Crane & Co.*, after the death of *James H. Crane* and the consequent dissolution of the firm. It is obvious that the surviving debtor could not affect the estate of the deceased by renouncing prescription, and thus destroy an acquired right. The liability of *Crane's* estate was already extinguished for services rendered more than three years previous, and the acknowledgment of the surviving debtor affected himself only. Troplong, Prescr., no. 629. Pothier, Oblig., no. 700.

It is therefore decreed, that the principal sum nominated in the judgment be reduced so as to be \$900, instead of \$1819 46, and that, so amended, the judgment be affirmed; the costs of the appeal to be paid by the plaintiff.



## LUDELING v. FRELLSEN.

It is not necessary that a petition of appeal should contain an express prayer that the appellee be cited, where there is but one antagonist party to be brought before the appellate court. *Per Cur*: We do not say that cases may not occur where it might be necessary to point out, to the ministerial officers, the respective persons whose citation the appellant may desire. Arts. 573, 581 must be construed with reference to the liberal spirit of the stat. of 20 March, 1839; and, in doing so, even if the point be doubtful, the appellant is entitled to the benefit of the doubt.

*Per Cur*: Under the peculiar circumstances of the case of *Selby v. Gibson*, 3 An. 319, the motion to dismiss was properly sustained; but we are not satisfied with all the points which are there ruled, nor were they all indispensable to the decision of the motion.

An appeal will not be dismissed, where the bond, though insufficient for a suspensive, is large enough for a devolutive, appeal.

Though the petition for an injunction to stay an order of seizure and sale merely state that, remittances to a certain amount were made to the mortgagees which should have been credited upon the note to secure the payment of which the mortgage was executed, without mentioning the dates, manner, and amounts of the respective remittances, yet if no exception be taken to the generality of the petition, and issue be joined on the plaintiff's averments, defendants cannot afterwards object to its generality.

Where a party to an action resides out of the parish in which the court is held, his adversary cannot compel him to bring his commercial books into court; but he may be ordered to produce, under oath, a sworn copy of a particular account. It is not necessary that interrogatories should be propounded to the party from whom the copy is required. Interrogatories may be propounded, and the party required to annex to his answers copies of the accounts; but this is not the only mode of getting at the contents of an adversary's books.

**A**PPEAL from the District Court of Ousachita, *Copley, J. R. W. Richardson*, for the appellants. *Garret, McGuire and Ray*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The defendant has moved to dismiss the appeal on various grounds, which we proceed to notice:

1. That the appellee has not been cited. No citation appears to have been made. The appellee contends that the omission to do so is attributable to the fault of the appellants,\* because in their petition of appeal they did not expressly pray that the appellee be cited. Under articles 573 and 581 C. P. we do not think such prayer was indispensable in a case like this, where there was but one antagonist party to be brought before the appellate court. We do not say that cases may not occur where it might be necessary to point out to the ministerial officers the respective persons whose citation the appellant might desire; but the officer could not possibly have been at loss in the present case. We must construe articles 573 and 581 with some reference to the liberal spirit of the statute of 1839; and doing so, even if the point be doubtful, the appellant is entitled to the benefit of the doubt. See *Gilmore v. Brenham*, 1 An. 414.

Not having been cited, the appellee would have been entitled to a continuance until a citation had been duly served. But as no application for further time has been made, the party simply insisting upon a dismissal, and proffering an argu-

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\*The plaintiff, and her surety in the injunction bond, both appealed.

ment upon the merits, if his motion be not sustained no delay in the decision of the court is necessary.

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We have not overlooked the case of *Selby v. Gibson*, 3 An. 319. Upon a reconsideration of that case, after elaborate argument, we are still of the opinion that, under the peculiar circumstances there presented, the motion to dismiss was properly sustained. But we are not satisfied with all the points which are there ruled, nor were they all indispensable to the decision of the motion.

II. It is said that the appeal bond is defective; that it only binds the appellants jointly, who should have bound themselves *in solido*; that, therefore, they are each bound only for the one half of \$800, the amount directed by the order of appeal; that the appellants asked, and the court ordered, a suspensive appeal; that the bond is insufficient for a suspensive appeal; and that the appellants are not even entitled to the benefit of a devolutive appeal. The appellants reply that, by legal intendment, the obligation is *in solido*; and that, even if it be not, the bond is ample to sustain the appeal as devolutive. In this latter position the appellants are clearly right. See *Ralph v. Hoggat*, 2 An. 462. *Lewis v. Splane*, Ib. 754. *Parks v. Patton*, 9 Rob. 167. It is unnecessary to decide now whether, under the bond given, the appeal is suspensive or devolutive. That is important with reference to the right of execution; and, if a question should hereafter arise upon that point, it will be time enough then to pass upon it.

We have thus disposed of the grounds for dismissal, but embrace the present occasion for making a few general remarks upon the subject of appeals. It is with extreme regret that the court has observed the looseness with which appeals are frequently taken, and the consequent frequency of motions for dismissal. A very large portion of our time, at the present term, has been spent in the hearing and consideration of motions for dismissal, which might have been more profitably employed in the discussion of legal principles. It is very easy, with a little care, to place an appeal beyond the possibility of cavil; and we would earnestly urge upon the bar a more careful observance of the formalities required by law. It should not be forgotten that a very grave responsibility, moral, at least, if not legal, rests upon an attorney whose inattention deprives his client of a high constitutional right. These remarks are dictated by a regard to the interests of justice, and a desire to repress a growing evil. We trust that they will be received and acted upon in the same spirit by the profession.

The present suit is a proceeding by injunction, brought under the following circumstances. *W. H. & J. H. Dinkgrave* were a commercial firm in Monroe. In January 1847, the plaintiff executed a power of attorney in favor of *John H. Dinkgrave*. This instrument recites that she is desirous of assisting the *Messrs. Dinkgrave* in their business, and particularly in enabling them to procure and to keep a stock of goods; and, in order to enable them to do so, a special mortgage on certain property, which she describes, may be required. She therefore authorizes her attorney to mortgage her property to *H. Frelsen & Co.*, merchants residing in New Orleans, to secure the final payment of any note, bill of exchange, or draft, made or drawn by *John H. Dinkgrave* or *William H. Dinkgrave*, either separately or together, or for any acceptance made for, or in favor of those persons, in any amount not to exceed five thousand dollars; it being expressly understood that whatever mortgage may be executed by the attorney, is to be security for the debts which the mortgage is intended to secure. In February 1847, *Dinkgrave*, acting under this power, and specially

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referring to it, executed a mortgage upon the plaintiff's property, in favor of *Frellsen & Co.*, to secure a note made by *W. H. & J. H. Dinkgrave*, payable 1st January 1848, for \$5,000; an indebtedness, as stated in the mortgage, for borrowed money and for drafts accepted.

*Frellsen & Co.* obtained an order of seizure and sale after the protest of this note, and caused the mortgaged property to be seized. Thereupon the plaintiff obtained an injunction, alleging, among other matters, that large remittances were from time to time made by the said *W. H. & J. H. Dinkgrave*, to the said *H. Frellsen & Co.*, and by him received, amounting to the sum of \$2,776 31, with interest from the date of the different payments (to offset the interests computed on the acceptances included in the note of \$5,000); and that she has a right to demand and require that the said sum of \$2,776 31, and interest, be credited on the note of \$5,000.

On the 10th January 1849, at the first term of the court after the institution of this suit, the defendant moved to dissolve the injunction on the ground of the insufficiency of the affidavit for injunction. The motion was over-ruled on the 11th January, and no error being alleged as to this ruling, it requires no further notice. On the 10th January, a general order was made that all cases at issue be set for trial in their order on the docket. On the 11th January, the defendant filed his answer. It commences with a general denial, and then specially "denies that any money was ever paid to him or his agent on the note on which the order of seizure and sale issued, which is enjoined in this case, except what is credited thereto.\* It expressly denies that *W. H.* and *J. H. Dinkgrave*, or either of them, ever made any payments on said note, except what is credited thereon. It is expressly averred that, all the money ever paid by *W. H.* and *J. H. Dinkgrave*, or either of them, to your respondents, was appropriated by your respondents, according to their express directions, or to the appropriation of which, as made by your respondent, they expressly assented. Wherefore respondent prays plaintiff's injunction be dissolved," &c.

On the 12th January, the plaintiff presented to the court in writing an application for an order directed to the defendant *Frellsen*, to produce his ledger, or other books, containing his account current with *W. H.* and *J. H. Dinkgrave*, showing the entire indebtedness of said *Dinkgrave*, from the 1st February 1847, to the 1st August 1848, and also all the payments made by them during the same period of time, and credits to which they are entitled, and asking that the court would fix a time when said books should be produced and deposited in the clerk's office for inspection; and praying also for such further orders as the nature of the case may require, and for general relief. Appended to this application was an affidavit of the plaintiff, that she hoped and expected to prove by the production of the books called for, that large payments had been made to *H. Frellsen & Co.* by *W. H.* and *J. H. Dinkgrave*, on account of the \$5,000 note, amounting to the sum of \$2,776 31, with interest, and that she had been informed that efforts had been made by *Dinkgrave* to obtain a full account current since the institution of this suit without effect. This application was opposed by the defendant, "on the ground that the allegations in the plaintiff's petition for injunction were not sufficiently definite to sustain any evidence of payments by said *W. H.* and *J. H. Dinkgrave*, and that no amendment could be permitted to the original grounds of injunction." The court refused to grant

\* The order of seizure and sale allowed a credit of \$45 95.

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the order, and the plaintiff took a bill of exceptions. From this bill it further appears that the plaintiff declared, on the argument of the motion, that she would be satisfied with a sworn extract from the books of a full account current of *W. H. and J. H. Dinkgrave* with *H. Frelsen & Co.*

We are of opinion that the court below erred. The objection that, under the indefinite allegations of the petition, no evidence of payments was admissible, was not well taken. It is true that the allegations of the petition merely stated that remittances to the amount of \$2,776 31, had been made by *W. H. and J. H. D.* to *H. F. & Co.*, which she had a right to have credited upon the note, without giving a detail of the time, manner, and items, of the respective remittances. But the defendant made no objection to the generality of the petition; he joined issue upon the plaintiff's averments; and thus clearly precluded himself from a subsequent objection.

It is conceded that, under the ruling in *Cooper v. Polk*, 2 Annual, 158, the plaintiff had no right to compel the defendant to bring his commercial books from New Orleans to Monroe. But he was entitled to a sworn copy of the designated account. It is said that interrogatories should have been propounded to the defendant. This objection was not made in the court below; and, if it had been, we should not be disposed to sustain it. In the case of *Cooper v. Polk*, we suggested that the defendant "might, in the interrogatories propounded by him to one of the plaintiffs, have required him to annex to his answers copies of the accounts;" but we did not say that it was the only mode of getting at the contents of the adversary's books. If *Frelsen & Co.* had lived in Monroe, the plaintiff, without propounding interrogatories, could have compelled them to produce the books themselves. As they lived at New Orleans, we see no objection that they produce under oath a sworn copy from the books of *W. H. and J. H. D.'s* account.

On a subsequent day of the term leave was asked to file an amended petition, in which the alleged credit of \$2,776 31 was pleaded more definitely. But we deem it unnecessary to pass upon the refusal to allow it to be filed; because, in our opinion, the plaintiff is entitled, under the original petition and answer, to prove credits to that amount.

At the trial of the cause the plaintiff offered witnesses to prove that *W. H. and J. H. D.* had made shipments of cotton and produce, and made remittances to *H. F. & Co.*, in the years 1847 and 1848; which testimony was objected to upon the ground that it was "inadmissible under the pleadings, the same not being sufficiently definite by dates and accounts to allow the testimony." We think the testimony should have been received, and refer to our previous remarks.

It is therefore decreed, that the judgment below be reversed; and it is further decreed that this case be remanded, with instructions to the court below to grant an order commanding the said *H. Frelsen* to produce and file under oath a copy of the accounts of *W. H. and J. H. Dinkgrave* with the said *H. Frelsen & Co.*, specified in the petition of the plaintiff calling for the same, and for further proceedings according to law; the costs of this appeal to be paid by the defendant.



## CASON et al. v. CABRARA, Administratrix.

A woman cannot be legally appointed administratrix of the succession of her brother. It is an office which a woman is incapable of exercising. C. C. 25.

A woman appointed administratrix of a succession, the duties of which she is incapable by law of exercising, can be made to account only for the property that has come into her hands.

**A**PPEAL from the District Court of Ouachita, *Copley, J. Baker*, for the appellants. *Stillman, M'Guire and Ray*, for the defendant. The judgment of the court was pronounced by

ROST, J. There is no error in the judgment appealed from in this case. The appointment of the defendant as administratrix of the succession of her brother *Andrew Parker*, was a nullity. This was a civil function which the law does not declare women capable of exercising, except in certain enumerated cases, and which they cannot therefore perform. C. C. art. 25, 1042. *Caraby v. Caraby*, 7 Mart. N. S. 466.

The defendant, having no authority to administer, could at most, be made to account for the property which came into her hands. The only property which came into her hands was a slave, which was legally sold; and the plaintiffs admit that they have received the proceeds of the sale.

The remainder of the succession appears to have been taken possession of by *John Parker*, the father of the deceased and of the defendant, who was also the father of some of the plaintiffs and the grandfather of the others. He paid most of the debts of the succession, and died without rendering any account of it, leaving the plaintiffs and the defendant as his heirs at law. The claim which the plaintiffs might have had against him, in his lifetime, is now extinguished by confusion.

Had the appointment of the administratrix been authorized by law, the plaintiffs have not shown that they had renounced the succession of *John Parker*; and we do not wish to be understood as intimating that they might in that case have maintained the present action.

*Judgment affirmed.*

## DICKSON v. GRISSOM.

A statement made by a party to an action is inadmissible in evidence, though offered to be proved by the answer of a witness, introduced by the opposite party, to a question propounded on his cross-examination, where the statement has no necessary or pertinent connection with any fact sworn to by the witness, and its admission was excepted to in time.

An act of sale of land situated in another State, which appears to have been acknowledged by the parties executing it before a justice of the peace in that State, and is certified by the clerk of the court in whose office the act was recorded as a true copy from the records of his office, though accompanied by a certificate of the governor of the State of the official capacity of the clerk and of the certificate's being in due form, &c., is not admissible as evidence of the original act, but is simply a private writing, and must be proved as such. *Per Cur*: There is no evidence before us that the certified copy of

the act of sale would be received in evidence in any court of the State in which it was executed, without satisfactorily accounting for the non-production of the original.

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v.  
GRISOM.

**A**PPEAL from the District Court of Ouachita, *Copley, J. Baker*, for the appellant. *R. W. Richardson*, for the defendant. The judgment of the court was pronounced by

**EUSTIS, C. J.** This suit was commenced by attachment of the property of the defendant, and is founded on a claim for indemnity on account of the eviction of the plaintiff from a tract of land, sold by the defendant to the plaintiff in the State of Mississippi. The amount alleged to be due the plaintiff by the defendant is four hundred dollars, the price of the land, and one hundred dollars damages, and the further sum of ten dollars and interest, the amount of a promissory note of the defendant's held by the plaintiff. The judgment of the district court was in favor of the defendant on the principal claim and damages, and against him for the amount of the note, to wit, ten dollars, with interest, together with costs. The plaintiff has appealed.

It appears that *Allen*, a witness, who had been examined on behalf of the plaintiff, on his cross-examination stated that the defendant had said, "the plaintiff had more money in his hands that belonged to him, the defendant, than he gave for the land at sheriff's sale, and that the plaintiff had paid him a part of the price of the land, and had retained enough, or more money, in his hands than to pay his bid at the sheriff's sale," &c. This statement of the witness was made in answer to the question propounded by the counsel for the defendant, as to this declaration of the defendant being made simultaneously with a fact stated by the witness elicited by the question propounded, that he, the defendant, had left the State of Mississippi, very much in debt. We think this statement of the defendant himself is not admissible in evidence, and cannot be considered as having any necessary or pertinent connection with the fact sworn to. It having been excepted to by counsel, the exception ought to have been sustained.

Another bill of exceptions was taken to a decision of the judge, receiving in evidence a certified copy of the deed of the land from the defendant to the plaintiff, on the ground that it was a copy of a private act, the execution of which had not been proved and not properly authenticated, &c. The deed appears to have been acknowledged by the parties executing it, the defendant and his wife, before a justice of the peace in the State of Mississippi, and to have been recorded in the office of the clerk of the Court of Probates of Yazoo county, Mississippi, who certifies the copy offered in evidence as a true copy of the original deed as appears on record in his office. To this certificate is appended the certificate of the governor of the State, of the official capacity of the clerk, and that the certificate annexed is in due form, &c. According to our laws the copy is not admissible as evidence of the original deed, but is considered a private writing and requires to be proved as such. Nor is there any evidence before us that the certified copy of the deed would be received in evidence in any court in Mississippi, without the non-production of the original, being satisfactorily accounted for. We think the court erred in admitting in evidence the copy of the deed. It is not necessary to examine the objections taken to the certificates. The exclusion of this piece of evidence, on which the plaintiff's case rests, renders it necessary to remand the case.

It is therefore decreed that the judgment appealed from be reversed, and that the case be remanded for a new trial, with directions to the district judge to be

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governed as to the matters submitted in the bill of exceptions by the decision of this court thereon; the appellee paying the costs of this appeal.

### KLEIN v. DINKGRAVE et al.

An agent is a competent witness for his principal; his relation to the latter being merely a matter to be considered in estimating his credibility.

Whether a conviction and sentence for felony in another State of the Union will, or will not, render a witness incompetent in the courts of this State, it is clear that any such disability will be removed by a pardon, where the disability was not annexed to the conviction of the crime by the express words of a statute.

Parol evidence is admissible to prove the consideration of a due bill, silent as to the consideration. The evidence cannot be considered as contradicting the terms of the written instrument.

**A**PPEAL from the District Court of Ouachita, *Copley, J. M'Guire* and *Ray*, for the plaintiff. *R. W. Richardson*, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The defendants are sued upon a due bill, signed by them, and payable to *John M. Crownrich*, or order. It is endorsed as follows: "Pay the within to *N. Klein*, for whose account the within was taken. *J. M. Crownrich*." The plaintiff, in addition to the usual averments, alleged, "that *Crownrich* transferred the note to him by writing on the back of it the words above-mentioned, that he acted merely as the plaintiff's agent in taking the note, and that the same is now, and always has been, the plaintiff's property."

The defence set up by the defendants is, that the transfer of the note to *Klein* was fraudulent and collusive, and made for the mere purpose of preventing *Dinkgrave* from setting off certain notes made by *Crownrich*, of which *Dinkgrave* is the holder by endorsement. The plaintiff meets this defence by asserting that a vehicle sold to *Dinkgrave*, for which the note was given, was his property, and was sold by *Crownrich* as his agent and for his account; and that *Dinkgrave* was aware of this when he made the purchase and gave the note.

Before considering this case upon the merits, it is properly briefly to notice certain points presented by bills of exception taken by the defendants. Whether on the face of the writing on the note unexplained, *Crownrich* was liable to *Klein* as an endorser, and, if so, whether he would be a competent witness in favour of *Klein* to prove that the vehicle belonged to *Klein*, and was sold for his account to the knowledge of the purchaser when he gave the note, are questions which it is unnecessary to decide. Under the allegations of the petition it is clear that *Crownrich* was not liable to the plaintiff as endorser, but was a mere agent. As such, and in a case like the present, he was a competent witness; and his relation to the party calling him was, at most, a mere matter to be considered in estimating his credibility.

It also appears that *Crownrich*, in a preliminary examination, acknowledged that he had been convicted in Mississippi of an infamous crime; but also stated, at the same time, that he had been pardoned. Whether or not a conviction and sentence for felony in another State of this Union would render a witness incompetent in a court of Louisiana, it is at any rate clear that such disability would be removed by a pardon, where the disability was not annexed to the conviction of the crime by the express words of a statute.

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There was no legal objection to the admission of parol evidence to prove that the vehicle was the consideration of the note, that it belonged to *Klein*, that it was sold for his account, and that *Dinkgrave* knew those facts. This was not a contradiction of the terms of the note, in the sense of the Code; and it would be superfluous to cite authority to shew with what liberality parol evidence is admitted to ascertain the equitable rights of the parties litigant in suits upon bills and notes.

Relieved from the objections to the admissibility of evidence, which was properly disregarded by the court below, the case turned upon questions of fact, dependent upon the weight and credibility of conflicting testimony. All this must have been considered by the district judge who heard the witnesses. It is not our province to disturb the opinion of a district judge or the verdict of a jury with regard to questions of fact, unless where such opinion or verdict appears to us manifestly erroneous; which we are not able to say, in the present case.

*Judgment affirmed.*

### JONES v. WHEELIS.

Where the United States have recognized the claim of one of two persons pretending to be settlers on the public lands and have issued a patent to him, the courts of this State have no power, in the absence of any equities or evidence taking the case out of the general rule, to revise their decision.

Decision in *Hollow v. Sapp*, ante p. 519, affirmed.

**A** PPEAL from the District Court of Franklin, *Barry, J. W. J. Q. Baker*, for the appellant. *Purvis*, for the defendant. The judgment of the court was pronounced by

**ROSE, J.** The plaintiff alleges that the defendant has fraudulently entered the land on which he resides, and obtained a patent from the United States. He prays that the patent may be adjudged to have enured to his benefit, and the defendant be ordered to transfer the land to him upon receiving back the price he has paid, or that, if the court should refuse to do this, he may have judgment against the plaintiff for \$1000, the alleged value of his improvements.

The answer contains a general denial, and an averment that the defendant was the first settler on the land, and that the plaintiff always acquiesced in his claim. There was judgment in his favor in the court below, and the plaintiff appealed.

On the trial a witness testified that the plaintiff went into possession under a lease from the defendant; but the same witness having stated, on his cross-examination, that the lease was reduced to writing, the court, on the application of the plaintiff, ordered all the testimony in relation to the lease to be stricken from the record. The counsel for the defendant took a bill of exceptions, which it is not necessary to notice.

The plaintiff and defendant stand before us as settlers upon the same quarter section of land. The United States have recognized the claim of the defendant to it to be well founded, and a patent has issued in his favor, in due course of law. We have no authority to revise this decision. There are no equities and evidence such as would take this case out of the general rule.

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So far as the question of damages is involved, this case does not differ from that of *Hollon v. Sapp*, ante p 519, decided at this term, to which we refer. The plaintiff has failed to make out a cause of action. *Judgment affirmed.*

### PRATT v. WAFER et al.

An universal legatee is only liable for his virile share of any debt due by the person whose legatee he is.

A party to a suit is competent to prove the loss of a paper on which his claim may depend, so as to authorize the introduction of secondary evidence to establish its contents.

**A**PPEAL from the District Court of Claiborne, *Olcott, J. Vaughn and Spofford*, for the plaintiff. *Lawson*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This suit is brought to recover the sum of \$322 from the defendants, *in solido*, and interest, being the amount paid by the plaintiff on an appeal bond in the case of *W. L. Barns v. Joel Wafer*. The plaintiff alleges that he became the surety of *Joel Wafer* at the instance of *Thomas Wafer* deceased, under a promise of indemnity made by the latter; that he paid the judgment rendered against *Joel Wafer*, and that the defendants, who are the universal legatees of said deceased and have accepted his succession, are bound by the contract of their testator to indemnify him. There was judgment against the defendants, and *Mabry Wafer*, one of them, has appealed.

It is conceded that the other defendant, who was a married woman, was not in court; and it is contended that *Mabry Wafer* is liable for the whole debt, under an *assumpsit*; but of this there is not sufficient evidence.

The appellant being one of two universal legatees, is only liable for his virile share of the debt. The judgment against *Joel Wafer* was affirmed on the appeal, and the amount of the judgment against the plaintiff on his bond was two hundred and seventy-five dollars, with interest from August 5th 1845, and costs. Concerning the latter, we have no evidence on which we can allow them. A bill of exceptions was taken to the admission of a witness to prove the contents of a letter. But as the letter was lost, we concur with the district judge in considering the evidence as admissible. It is well settled that a party to a suit is competent to prove the loss of a paper on which his claim may depend, so as to authorize the introduction of secondary evidence to establish its contents. *Donellan v. Taylor*, 8 Pick. 390. *Adams v. Leland*, 7 Ib. 62. *N. O. & Carrollton Bank v. Armstrong*, 2 An. 830. Its contents, as proved by the witness, are corroborated by the subsequent declarations and conduct of the appellant.

The judgment of the district court is reversed; and it is decreed that the plaintiff recover from the defendant *Mabry Wafer*, one hundred and thirty-seven dollars and fifty cents, with interest from the 5th of August 1845, and costs; the plaintiff paying the costs of this appeal.

## WHITE v. McDOWELL and husband.

Where a witness, incompetent on account of interest, is admitted without objection, and testifies in favor of that interest, his interest in the event of the suit can only affect his credibility.

A tutrix cannot, without being specially authorized, execute a note in the name of her pupil, which will be binding on the latter.

Where a creditor writes at the foot of an account, "Received payment by note," it is a novation of the debt.

**A**PPEAL from the District Court of Morehouse, *Selby, J. Purvis* and *Morrison*, for the plaintiff. *Baker*, for the appellants. The judgment of the court, *Slidell J.* dissenting, was pronounced by

**ROST, J.** The plaintiff is the transferee of a promissory note, subscribed by the tutrix of *Mrs. McDowell*, before the marriage of the latter and in her name, for supplies furnished to her during minority. This note is dated in the month of March 1841, and bears interest at the rate of ten per cent per annum from the first day of January preceding. He instituted this action in the parish court against both defendants, on the grounds that the note was for supplies furnished to the wife, and that since the marriage the husband had assumed to pay it. He obtained judgment in that court against the husband only. On appeal to the district court judgment was also rendered against the wife, and she appealed.\*

The testimony of *Temple*, the payee of the note, was admitted without objection in the court below. We cannot, therefore, disregard it; and, although the contingent interest he had in the event of the suit may affect his credibility when he testifies in furtherance of that interest, his evidence is entitled to full faith so far as it makes against it. We can of course take no notice of his declaration that, he took the note with the intention of not releasing the minor. This is a question of law to be deduced from his acts. The defendant *Mrs. McDowell* alleges, in her answer, that she has in her possession receipts and vouchers, which prove that she has paid the account for which this note was given. *Temple*, the plaintiff's witness, states that he wrote the following receipt at the foot of that account:—"Received payment by note of *Elizabeth Ross*, tutrix, &c.;" and it is admitted in the record that the account thus receipted was adduced by her, as a payment made, in the final settlement of her account as tutrix, and that this payment was allowed to her.

It is not shown that the tutrix had authority to give a note of any kind on behalf of the minor, and more particularly a note bearing the highest rate of conventional interest from a time anterior to its date. This note must therefore be considered as the personal obligation of *Elizabeth Ross*. It was thus viewed by her, by the defendant, and by the judge before whom the tutorship account was settled; the settlement was made on that hypothesis.

The question which this case presents is, whether a receipt for a note in payment of an account is a novation of the debt. It was decided in the affirmative in the cases of *Baron et al. v. Howe*, 2 Mart. N. S. 146, *Abat et*

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\* The husband also appealed.

WHITE *al. v. Nolté et al.*, 6 Ib. N. S. 636; *Murdock v. Coleman*, 1 An. 410; *Cam-*  
 v. *mack v. Griffin*, 2 An. 177. After these decisions, the question can no longer  
 McDOWELL. be considered as open.

It is therefore ordered that the judgment in this case be reversed; and that there be judgment in favor of the defendant, with costs in both courts.

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### COLVIN v. NELSON.

A donation of slaves, and their increase, for the sole use and benefit of the donee during her natural life, and at her death to the heirs of her body forever; but, in the event of her dying without issue of her body and of her husband's surviving her, the husband to enjoy during his natural life all the use and benefit arising from the labor of the slaves and their increase, and, at his death, the slaves and their increase to revert to the heirs of the body of the donor, and to be their's forever, creates a substitution, and is void.

The facts alleged in an application for a new trial on the ground of the discovery of new and material evidence since the trial, must be supported by an affidavit. C. P. 561.

An intervention will not be allowed, where its reception must retard the decision of the principal action.

**A**PPEAL from the District Court of Ousachita, *Copley, J. Richardson and Sharp*, for the plaintiff. *McGuire and Ray*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action to annul a donation made by the mother of the plaintiff and defendant, who are sisters, of certain slaves in favor of the defendant, on the ground that the donation contained a substitution. The clause disposing of the slaves is as follows :

"Doth by these presents convey, donate, and forever grant and donate to her said daughter *Nancy Harriet Nelson*, the following slaves for life, on the conditions hereinafter to be written in this act : one negro man named *Levi* about 28 years old, *Charlotte* a woman about 28 years old, and her five children, namely, *Caroline* about ten years old, *Jenny* about eight years old, *Hughes* about six years old, *Maria* about four years old, and *Buck* about three years old, as also their increase for ever. The said *Nancy Harriet Nelson* to have and to hold the said slaves, and their increase, for her own sole use and benefit, for and during her natural life ; and, at her death, the heirs of the body of the said *Nancy Harriet*, shall inherit them forever ; and the said *Donnevant* (formerly *Sarah Donnevant Huey*) further conditions that, in the event her said daughter should depart this life without issue of her body, and that her husband as aforesaid, namely, *Thomas Jefferson Nelson*, should survive his said wife, then, in that event, the said *Thomas Jefferson Nelson* shall, during his natural life, enjoy all the use and benefits arising from the labor of said slaves and their increase, and, at his demise, the aforesaid slaves and their increase shall go to the heirs of the body of the said *Sarah Donnevant* (formerly *Sarah Donnevant Huey*) and to be by them\* in the last mentioned event to be their's forever."

The district judge properly considered this clause as creating a substitution and annulled the donation, decreeing the slaves to be the joint property of the

\* Sic in *Mss. R.*

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v.  
NELSON.

plaintiff and defendant as heirs of their mother, and giving the plaintiff judgment for the one-half value of one of the slaves, which had been disposed of by the defendant previous to the institution of the suit. And, as the plaintiff had prayed for a partition, he referred the parties to a notary for the purpose of having it formally made, expressly reserving the rights and obligations of each, to make and exact collation, as they might exist, in the succession of their mother, which had never been settled by the two heirs. The defendant has appealed. The plaintiff has asked that the judgment be amended, allowing the hire of the slaves; but the judge having reserved expressly this matter to be determined on the final partition, we have not the evidence before us to decide it, and it is not in the interest of the plaintiff to remand the cause on that account.

After judgment was rendered, an application was made by the counsel for the defendant for a new trial, inasmuch as, since the trial of the cause, a will of the deceased donor had been discovered and admitted to probate, and this will disposed of the property which was the subject of donation. Of this no affidavit was offered, as the Code of Practice requires. Art. 561. The judge refused to grant the new trial. A petition of intervention of the executor under the will was, at the same time, attempted to be filed, but the judge refused to admit it, on the ground that it would retard the decision of the cause. We think the judge did not err. The intervention would necessarily embarrass and complicate the case before the court, which turned upon the validity of the donation, and was so decided. The property going back to the succession, the questions arising under the will are to be determined when its execution is enforced. We think the course adopted by the judge, tending to preserve simplicity and order in the proceedings, was the best for the interest of both parties.

*Judgment affirmed.*

## CANAL AND BANKING COMPANY et al. v. BROWN et al.

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The failure of any of the persons named as sureties in an administrator's bond to sign it, authorizes those who have signed it to retract, but they must do so seasonably; it is too late, after the obligation of those who signed has been completed by the delivery of the bond, and after the judge, the creditors of the succession, and the administrator, have been permitted to act upon the bond, to oppose the omission of the other signatures.

An administrator's bond, found in its proper place among the papers of the succession, though not marked *filed*, must be presumed, in the absence of other evidence, to have been acted upon by the judge in authorizing the administrator to take possession, and by the creditors in acquiescing in the appointment.

A judgment against the principal in an action on an administrator's bond is not conclusive against the sureties, who were not parties to the action on which the judgment was rendered.

By the Civil Code sureties could be joined in the action against their principal, and be subjected to the same judgment; but as relates to sureties on the bonds of administrators, tutors, curators, executors, and appellants, the law has been changed by the statute of 16th March, 1842, s. 6.

**A**PPEAL from the District Court of Catahoula, *Barry, J. McGuire* and *Ray*, for the plaintiffs. *Phelps* and *Purvis*, for the appellants. The judgment of the majority of the court was pronounced by



WHITE *al. v. Notté et al.*, 6 Ib. N. S. 636; *Murlock v. Coleman*, 1 An. 410; *Cam-*  
*mark v. Griffin*, 2 An. 177. After these decisions, the question can no longer  
 McDOWELL be considered as open.

It is therefore ordered that the judgment in this case be reversed; and that there be judgment in favor of the defendant, with costs in both courts.

### COLVIN v. NELSON.

A donation of slaves, and their increase, for the sole use and benefit of the donee during her natural life, and at her death to the heirs of her body forever; but, in the event of her dying without issue of her body and of her husband's surviving her, the husband to enjoy during his natural life all the use and benefit arising from the labor of the slaves and their increase, and, at his death, the slaves and their increase to revert to the heirs of the body of the donor, and to be their's forever, creates a substitution, and is void.

The facts alleged in an application for a new trial on the ground of the discovery of new and material evidence since the trial, must be supported by an affidavit. C. P. 561.

An intervention will not be allowed, where its reception must retard the decision of the principal action.

**A**PPEAL from the District Court of Ouachita, *Copley, J. Richardson and Sharp*, for the plaintiff. *McGuire and Ray*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action to annul a donation made by the mother of the plaintiff and defendant, who are sisters, of certain slaves in favor of the defendant, on the ground that the donation contained a substitution. The clause disposing of the slaves is as follows :

"Doth by these presents convey, donate, and forever grant and donate to her said daughter *Nancy Harriet Nelson*, the following slaves for life, on the conditions hereinafter to be written in this act : one negro man named *Levi* about 28 years old, *Charlotte* a woman about 28 years old, and her five children, namely, *Caroline* about ten years old, *Jenny* about eight years old, *Hughes* about six years old, *Maria* about four years old, and *Buck* about three years old, as also their increase for ever. The said *Nancy Harriet Nelson* to have and to hold the said slaves, and their increase, for her own sole use and benefit, for and during her natural life ; and, at her death, the heirs of the body of the said *Nancy Harriet*, shall inherit them forever ; and the said *Donnevant* (formerly *Sarah Donnevant Huey*) further conditions that, in the event her said daughter should depart this life without issue of her body, and that her husband as aforesaid, namely, *Thomas Jefferson Nelson*, should survive his said wife, then, in that event, the said *Thomas Jefferson Nelson* shall, during his natural life, enjoy all the use and benefits arising from the labor of said slaves and their increase, and, at his demise, the aforesaid slaves and their increase shall go to the heirs of the body of the said *Sarah Donnevant* (formerly *Sarah Donnevant Huey*) and to be by them\* in the last mentioned event to be their's forever."

The district judge properly considered this clause as creating a substitution and annulled the donation, decreeing the slaves to be the joint property of the

\* Sic in Mss. R.

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plaintiff and defendant as heirs of their mother, and giving the plaintiff judgment for the one-half value of one of the slaves, which had been disposed of by the defendant previous to the institution of the suit. And, as the plaintiff had prayed for a partition, he referred the parties to a notary for the purpose of having it formally made, expressly reserving the rights and obligations of each, to make and exact collation, as they might exist, in the succession of their mother, which had never been settled by the two heirs. The defendant has appealed. The plaintiff has asked that the judgment be amended, allowing the hire of the slaves; but the judge having reserved expressly this matter to be determined on the final partition, we have not the evidence before us to decide it, and it is not in the interest of the plaintiff to remand the cause on that account.

After judgment was rendered, an application was made by the counsel for the defendant for a new trial, inasmuch as, since the trial of the cause, a will of the deceased donor had been discovered and admitted to probate, and this will disposed of the property which was the subject of donation. Of this no affidavit was offered, as the Code of Practice requires. Art. 561. The judge refused to grant the new trial. A petition of intervention of the executor under the will was, at the same time, attempted to be filed, but the judge refused to admit it, on the ground that it would retard the decision of the cause. We think the judge did not err. The intervention would necessarily embarrass and complicate the case before the court, which turned upon the validity of the donation, and was so decided. The property going back to the succession, the questions arising under the will are to be determined when its execution is enforced. We think the course adopted by the judge, tending to preserve simplicity and order in the proceedings, was the best for the interest of both parties.

*Judgment affirmed.*

## CANAL AND BANKING COMPANY et al. v. BROWN et al.

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112 309

The failure of any of the persons named as sureties in an administrator's bond to sign it, authorizes those who have signed it to retract, but they must do so seasonably; it is too late, after the obligation of those who signed has been completed by the delivery of the bond, and after the judge, the creditors of the succession, and the administrator, have been permitted to act upon the bond, to oppose the omission of the other signatures.

An administrator's bond, found in its proper place among the papers of the succession, though not marked *filed*, must be presumed, in the absence of other evidence, to have been acted upon by the judge in authorizing the administrator to take possession, and by the creditors in acquiescing in the appointment.

A judgment against the principal in an action on an administrator's bond is not conclusive against the sureties, who were not parties to the action on which the judgment was rendered.

By the Civil Code sureties could be joined in the action against their principal, and be subjected to the same judgment; but as relates to sureties on the bonds of administrators, tutors, curators, executors, and appellants, the law has been changed by the statute of 16th March, 1842, s. 6.

**A**PPEAL from the District Court of Catahoula, *Barry, J. McGuire* and *Ray*, for the plaintiffs. *Phelps* and *Purvis*, for the appellants. The judgment of the majority of the court was pronounced by

WHITE v. McDOWELL. *al. v. Nolté et al.*, 6 Ib. N. S. 636; *Murdock v. Coleman*, 1 An. 410; *Cam-mack v. Griffin*, 2 An. 177. After these decisions, the question can no longer be considered as open.

It is therefore ordered that the judgment in this case be reversed; and that there be judgment in favor of the defendant, with costs in both courts.

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COLVIN v. NELSON.

A donation of slaves, and their increase, for the sole use and benefit of the donee during her natural life, and at her death to the heirs of her body forever; but, in the event of her dying without issue of her body and of her husband's surviving her, the husband to enjoy during his natural life all the use and benefit arising from the labor of the slaves and their increase, and, at his death, the slaves and their increase to revert to the heirs of the body of the donor, and to be their's forever, creates a substitution, and is void.

The facts alleged in an application for a new trial on the ground of the discovery of new and material evidence since the trial, must be supported by an affidavit. C. P. 561.

An intervention will not be allowed, where its reception must retard the decision of the principal action.

**A**PPEAL from the District Court of Ouachita, *Copley, J. Richardson and Sharp*, for the plaintiff. *McGuire and Ray*, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action to annul a donation made by the mother of the plaintiff and defendant, who are sisters, of certain slaves in favor of the defendant, on the ground that the donation contained a substitution. The clause disposing of the slaves is as follows :

"Doth by these presents convey, donate, and forever grant and donate to her said daughter *Nancy Harriet Nelson*, the following slaves for life, on the conditions hereinafter to be written in this act : one negro man named *Levi* about 28 years old, *Charlotte* a woman about 28 years old, and her five children, namely, *Caroline* about ten years old, *Jenny* about eight years old, *Hughes* about six years old, *Maria* about four years old, and *Buck* about three years old, as also their increase for ever. The said *Nancy Harriet Nelson* to have and to hold the said slaves, and their increase, for her own sole use and benefit, for and during her natural life ; and, at her death, the heirs of the body of the said *Nancy Harriet*, shall inherit them forever ; and the said *Donnevant* (formerly *Sarah Donnevant Huey*) further conditions that, in the event her said daughter should depart this life without issue of her body, and that her husband as aforesaid, namely, *Thomas Jefferson Nelson*, should survive his said wife, then, in that event, the said *Thomas Jefferson Nelson* shall, during his natural life, enjoy all the use and benefits arising from the labor of said slaves and their increase, and, at his demise, the aforesaid slaves and their increase shall go to the heirs of the body of the said *Sarah Donnevant* (formerly *Sarah Donnevant Huey*) and to be by them\* in the last mentioned event to be their's forever."

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plaintiff and defendant as heirs of their mother, and giving the plaintiff judgment for the one-half value of one of the slaves, which had been disposed of by the defendant previous to the institution of the suit. And, as the plaintiff had prayed for a partition, he referred the parties to a notary for the purpose of having it formally made, expressly reserving the rights and obligations of each, to make and exact collation, as they might exist, in the succession of their mother, which had never been settled by the two heirs. The defendant has appealed. The plaintiff has asked that the judgment be amended, allowing the hire of the slaves; but this judge having reserved expressly this matter to be determined on the final partition, we have not the evidence before us to decide it, and it is not in the interest of the plaintiff to remand the cause on that account.

After judgment was rendered, an application was made by the counsel for the defendant for a new trial, inasmuch as, since the trial of the cause, a will of the deceased donor had been discovered and admitted to probate, and this will disposed of the property which was the subject of donation. Of this no affidavit was offered, as the Code of Practice requires. Art. 561. The judge refused to grant the new trial. A petition of intervention of the executor under the will was, at the same time, attempted to be filed, but the judge refused to admit it, on the ground that it would retard the decision of the cause. We think the judge did not err. The intervention would necessarily embarrass and complicate the case before the court, which turned upon the validity of the donation, and was so decided. The property going back to the succession, the questions arising under the will are to be determined when its execution is enforced. We think the course adopted by the judge, tending to preserve simplicity and order in the proceedings, was the best for the interest of both parties.

*Judgment affirmed.*

## CANAL AND BANKING COMPANY et al. v. BROWN et al.

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112 309

The failure of any of the persons named as sureties in an administrator's bond to sign it, authorizes those who have signed it to retract, but they must do so seasonably; it is too late, after the obligation of those who signed has been completed by the delivery of the bond, and after the judge, the creditors of the succession, and the administrator, have been permitted to act upon the bond, to oppose the omission of the other signatures.

An administrator's bond, found in its proper place among the papers of the succession, though not marked *filed*, must be presumed, in the absence of other evidence, to have been acted upon by the judge in authorizing the administrator to take possession, and by the creditors in acquiescing in the appointment.

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By the Civil Code sureties could be joined in the action against their principal, and be subjected to the same judgment; but as relates to sureties on the bonds of administrators, tutors, curators, executors, and appellants, the law has been changed by the statute of 16th March, 1842, s. 6.

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COLVIN v. NELSON.

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After judgment was rendered, an application was made by the counsel for the defendant for a new trial, inasmuch as, since the trial of the cause, a will of the deceased donor had been discovered and admitted to probate, and this will disposed of the property which was the subject of donation. Of this no affidavit was offered, as the Code of Practice requires. Art. 561. The judge refused to grant the new trial. A petition of intervention of the executor under the will was, at the same time, attempted to be filed, but the judge refused to admit it, on the ground that it would retard the decision of the cause. We think the judge did not err. The intervention would necessarily embarrass and complicate the case before the court, which turned upon the validity of the donation, and was so decided. The property going back to the succession, the questions arising under the will are to be determined when its execution is enforced. We think the course adopted by the judge, tending to preserve simplicity and order in the proceedings, was the best for the interest of both parties.

*Judgment affirmed.*

## CANAL AND BANKING COMPANY et al. v. BROWN et al.

4 545  
112 309

The failure of any of the persons named as sureties in an administrator's bond to sign it, authorizes those who have signed it to retract, but they must do so seasonably; it is too late, after the obligation of those who signed has been completed by the delivery of the bond, and after the judge, the creditors of the succession, and the administrator, have been permitted to act upon the bond, to oppose the omission of the other signatures.

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A judgment against the principal in an action on an administrator's bond is not conclusive against the sureties, who were not parties to the action on which the judgment was rendered.

By the Civil Code sureties could be joined in the action against their principal, and be subjected to the same judgment; but as relates to sureties on the bonds of administrators, tutors, curators, executors, and appellants, the law has been changed by the statute of 16th March, 1842, s. 6.

**A**PPEAL from the District Court of Catahoula, *Barry, J. McGuire* and *Ray*, for the plaintiffs. *Phelps* and *Purvis*, for the appellants. The judgment of the majority of the court was pronounced by

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BROWN.

EUSTIS, C. J. On the 26th of December 1839, *Pascal Austin*, as administrator of the succession of *Thomas Bryan* and *Melinda Bryan*, executed a bond for the faithful discharge of his duties as administrator, with seven persons as his sureties. There are some other persons named in the bond, who did not sign it. The responsibility of two of them, who had a separate trial, has been adjudicated upon in the case of the *Canal and Banking Company v. Grayson*, ante p. 511. The survivors of the remaining nine persons, and the representatives of those of them who are dead, are sued, to be made responsible as sureties of *Austin*, by several of the creditors of the succession of *Bryan*. The plaintiffs had judgment for the several amounts appearing to be due them, and the defendants have appealed. The two other defendants, who did not sign the bond, we consider as in no sense the sureties of the administrator, for the reasons given in the case referred to, the facts in both cases being not dissimilar, and governed by the same legal principals: they must be held not liable in plaintiffs action. The first ground of defence taken in argument is that, the bond is void, because the parties signed it on the condition that the four other persons, whose names are contained in the bond, should also become parties to it; that it was an escrow, and had no effect as a bond until completed by all their signatures; and was delivered to the parish judge as an escrow, to take effect in the event of all the signatures being affixed to it, and in no other.

A bill of exceptions was taken by the counsel for the defendants to the admission of the bond in evidence; but as the objections can all be noticed in considering its effect as a bond valid and obligatory in law, it is not necessary to remark on the several points made to its admissibility.

It is stated that this defence is sustained by the evidence of the bond itself, which contains four names in the recital of the parties which are not signed to the instrument, and that in such a case the parties who have signed are not bound in law on the bond. The cases of *Wells v. Dill*, 1 N. S. 592, and *Pauling v. The United States*, 4 Cranch, 219, are relied upon in support of this position.

We have already had occasion to examine the case of *Wells v. Dill*, when cited in support of the doctrine in the case of *Taylor v. Jones*, 3 Annual Rep. 621; and we held the report of the case to be too imperfect to authorize the inference drawn by counsel. In that case the decision seems to have been based on the authority of the case cited from Cranch, and Pothier on Obligations, No. 11.

Pothier says: "Lorsqu'il y a un acte sous signatures privées d'un marché qui n'a pas reçu sa perfection entière par les signatures de toutes les personnes exprimées dans l'acte, quelqu'une d'elles s'étant retirées sans signer, celles qui ont signé peuvent se dire, et sont crues à dire qu'en faisant dresser cet acte elles ont eu l'intention de faire dépendre de la perfection de cet acte leur convention."

. If any of the parties to a contract, which has not yet been perfected by the signatures of all the persons whose names are mentioned in the act, should refuse to sign it, those who had signed it may retract. The defendants, on the refusal of the other parties to sign, could have withdrawn their signatures. But the difficulty in the application of this authority is that, the obligation of the defendants was completed by the delivery of the bond, and that, after permitting the judge and the creditors of the succession and the administrator to act upon the bond as it stood, they can no longer be heard on the objection of the want of the other signatures.

The case of *Pawling* turned on a question of fact, whether the bond was delivered as an escrow or absolutely. There appears to be nothing in the opinion which is applicable to the case under consideration. It was before us in the case of *Taylor v. Jones*, and had already been examined by this court in the case of *McNamara v. Purvis*, 2 Annual, 592. We then expressed our view of the law to be that, the failure of any of the parties to a contract to sign the instrument gave to those who had signed a right to retract, yet it was incumbent on them to do so seasonably and before the contract takes effect. Certainly there is nothing in the opinion of the Chief Justice in *Pawling's* case which are in conflict with this doctrine.

The defendants have pleaded that the bond was handed to the judge as an escrow, to be of avail when signed by the parties named in it.

The clerk of the district court swears that the bond was found among the papers transferred from the office of the late parish judge to his office, and that no other bond of *Austin* was there found. It bore the endorsement *Bond of Administrator*, without any note of filing or other memorandum. It bears date the 26th of December 1839, and recites that *Pascal Austin* has been appointed administrator. The oath of *Austin*, as administrator, was taken two days previous before the judge, and letters of administration were granted by the judge on the 13th of January following, and under this authority the succession has been administered, or rather dilapidated, by the administrator, without any attempt on the part of the sureties to prevent it, or to have themselves released. The proceedings are far from being regular, but we can find no defect which reaches the validity of the bond. The presumption attached to the legal acts of the judge is that the bond, which is in its proper place among the papers of the succession of *Bryan*, was acted upon by the judge in authorizing the administrator to take possession and administer the succession, and by the creditors in acquiescing in the appointment.

There is no evidence, other than that stated, concerning the delivery of the bond; and we conclude that the defendants who signed it are bound by it, on the principles settled in the case of *Taylor v. Jones*.

These are the views of a majority of this court, as at present advised. But as we remand the cause for a new trial, the subject is still open for further examination.

The plaintiffs brought this action on a judgment and proceedings under it, in a suit against *Austin*, the administrator, which were offered in evidence without objection. On the trial of the cause two of the defendants offered evidence to prove that this judgment was for a much larger sum than *Austin*, the administrator, was liable for. The admission of this evidence was objected to by the counsel of the plaintiffs, on the ground that the defendants were bound by said judgment, and were precluded from examining into the grounds or correctness of said judgment. This objection was sustained by the judge, and the evidence not admitted.

The question is thus presented whether a judgment on an administrator's bond is, under our laws, conclusive upon the sureties, who were not parties to the action in which the judgment was rendered.

A judgment in favor of the principal debtor necessarily inures to the benefit of the surety; but Pothier states that, when the judgment is against the principal debtor the creditor can oppose it to the surety, and require that it be made



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executory against him, but the surety is permitted to appeal from this judgment, or, if it be rendered in a court of the last resort, to make a third opposition to it. Pothier on Oblig. 816, De Re Judicata, § 60.

There does not appear to have been provided in the Code of Practice any mode of making an opposition in the case of a surety who is sued on a judgment rendered against the principal debtor, the Code providing for two cases only. Hence it seems obvious, and has been so decided, that all rights other than those provided for in the Code are to be carried out in the ordinary action. *Skillman v. Parnell*, 3 La. 494. We have held that judgments of this kind were not conclusive on sureties. The case of collusion between the creditor and the principal debtor presents an example, in which the necessity of this rule is apparent. *Dawes v. Shed*, 15 Mass. 7. *Heard v. Lodge*, 20 Pickering, 59.

By the Civil Code sureties could be joined in the same action with the principals, and would consequently be subjected to the same judgment; but in relation to sureties on the bonds of tutors, administrators, &c. the law has been changed by the act of 1842. That act provides that no such suit shall be instituted against the surety, until the necessary steps have been taken to enforce payment against the principal.

A plaintiff was accordingly non-suited, who attempted to sue the surety of a curatrix of a vacant succession before having taken the legal steps to enforce his judgment against the curatrix. *Wilson v. Murrell*, 6 Robinson, 68. This prohibition of the sureties being made parties to the suit against the principal debtor, strengthens the position that they cannot be held to be concluded by the judgment.

We therefore conclude that the judge erred, in excluding the evidence offered for the reason that the judgment against *Austin* was conclusive upon his sureties; and that said judgment is not conclusive, but may be enquired into and corrected on proper allegations and by legal evidence. Some of the defendants have expressly pleaded fraud in not resisting the judgment, and as they do not unite in their pleas, and the want of proper allegations of defence is not mentioned in the bill of exceptions, we have confined our decision to the question of law therein stated.

It is therefore decreed that the judgment of the district court be reversed, and that judgment be rendered in favor of the legal representatives of *Resis Criswell* and *G. L. Lovelace*, against the plaintiffs, with costs in both courts; and it is further ordered that the case be remanded for a new trial as to the other appellants, with directions to the judge not to refuse the evidence offered by the two defendants, as stated in their bill of exceptions, on the grounds by him, the said judge, therein set forth; the appellees paying the costs of this appeal.

SLIDELL, J. I wish to be considered as not expressing an opinion as to the validity of the bond, not having formed one; and concur in the decree remanding the cause, as leaving the subject open for further examination.

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#### BUFFINGTON v. DINKGRAVE.

Under section 4 of the statute of 3d May 1847, the tax on pedlers and hawkers is due from the time when the applicant for a license commences to sell; and, as all taxes are

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laid for the calendar year, a license for the year 1848, will not authorize the person obtaining it to sell under it in 1849. At whatever period of the year 1846 the license may have been issued, it will expire with that year. Nor can one who obtains a license at any time after the commencement of the year complain that he pays as much for a license to trade during a portion of the year as others have paid for the whole year; the inequality is of his own creation, and does not render the statute unconstitutional.

The collection of the taxes on pedlers and hawkers for the calendar year, is secured by the bond given in that year by the sheriff, as tax-collector, for the taxes assessed for the preceding year: thus, the taxes on pedlers and hawkers for 1848, which the sheriff receives in the course of that year as the licenses are issued, is secured by the bond given for the general taxes for the year 1847, which are assessed in that year and collected in 1848, the bond providing for the payment of all sums for which the sheriff may become legally liable during that year.

**A**PPPEAL from the District Court of Ouachita, *Copley, J. Garrett*, for the plaintiff. *Sharp and Stillman*, for the appellant. The judgment of the court was pronounced by

ROSE, J. This action was instituted by the plaintiff to recover back from *Dinkgrave*, sheriff and tax-collector, state and parish taxes, paid under protest, for a license to sell goods in a flatboat at the landing of the town of Monroe. The plaintiff alleges that his boat was laden with the produce of the soil and manufactures of the other States of the Union, and that he was on that account exempt from taxation: That, if he had been liable for the tax, the first license should have endured one year from its date, and he was not liable for the tax of 1849, when he paid it, the year not having expired: That the defendant was not authorized to collect said taxes, and had not given bond at the time: That to be taxed for one month as much as others pay for one year, is unequal and unjust, and that the laws taxing pedlers and hawkers are unconstitutional on that ground: That he was compelled to make payment to avoid the seizure and sale of his property. He prays that the State and the Parish be made parties to these proceedings, and that he may have judgment for the amount paid by him.

The defendant answered that he acted in the premises in the discharge of his duty as collector of the state and parish taxes, and averred his authority to do so, and the liability of the plaintiff to pay the tax; he also denied generally the allegations of the petition,

The district attorney, and the counsel for the police jury, also appeared and joined in the defence, justifying the acts of the defendant, and alleging that the boat of the plaintiff was laden with foreign products.

There was judgment in favour of the plaintiff, and the defendant appealed.

We are of opinion that the provisions of the act of 1848, exempting from taxation "any boat or boats laden exclusively with the products of the soil and manufactures of the other States for sale," is general in its character, and that the plaintiff would have been entitled to the benefit of it, if he had brought himself within the exception.

It is not necessary to determine upon which of the parties the burden of proof lies. The plaintiff, in his petition, does not call upon the defendant to prove that he sold foreign products. He holds the affirmative of the issue without any reservation, and, in the opening of the case, introduced a witness in support of it. That witness testified that he had bought a great many articles from the plaintiff, and that his assortment consisted of domestic goods, as far as he remembers; but the same witness stated that he seldom bought of the plaintiff

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himself, he generally dealt with his clerk. The clerk must have known positively the nature of the assortment. Why was not his evidence taken? This omission is suspicious; and the testimony of *Dillard* that, he went on board of the boat and saw the clerk selling coffee and other foreign products, explains the reason of it.

Should it be conceded that the burthen of proof is upon the defendant, the testimony of *Dillard* is positive, and cannot be got over. It was excepted to on account of the general character of the answer, but it is clear it could not have taken the plaintiff by surprise. Coffee being the foreign product stated to have been sold by him, in the receipt and protest upon which his action is based. The plaintiff has failed to show that he was within the exception, and if the taxes were legal and properly assessed he has no cause of action.

We will dismiss the ground of unconstitutionality by reason of the inequality of the tax, with a simple reference to the cases of *The Second Municipality v. Duncan*, 2d Annual 182, and *The City of Lafayette v. Cummins*, 3d Annual 674, in which the same question was thoroughly examined, and decided adversely to the plaintiff's pretensions.

Under the 4th section of the act of the 3d of May 1847, this tax was due and demandable from the time the plaintiff commenced to sell; and, as we understand all taxes to be laid for the calendar year, the license for 1848 expired with that year, and the plaintiff could not sell under it in 1849. The inequality of which he complains is of his own creation. The license authorises him to trade for the year during which it is granted, without reference to its date.

It is further argued that the defendant had not given bond for the collection of the taxes at the time they were collected. If this was true, and the taxes were justly due, it would not probably be a sufficient reason to authorize the plaintiff to recover the amount claimed. *Worsley et al. v. Second Municipality*, 9 Rob. p. 324. But we are satisfied that the objection is untenable. By the 44th section of the act of 1847, it is made the duty of sheriffs, before they commence the collection of the taxes, to give bond in a sum at least equal to one-half over and above the amount of taxes levied for state purposes, conditioned for the faithful performance of the duty of tax collector and for the just and faithful payment of all sums for which the sheriff may become legally liable. The taxes spoken of in this section are the general taxes on property, which are assessed one year and collected the next; for instance, the bond for the tax of 1848 was given only in 1849. The tax on peddlers and hawkers for the year 1848, which it is made the duty of the sheriff to receive in the course of that year as the licenses are issued, could not therefore have been secured by that bond; but the bond for the general tax of 1847, which was given in 1848, was not only for the faithful performance of his duty as collector of those taxes, but also for the just and faithful payment of all sums for which he might become legally liable during that year. The tax on peddlers and hawkers must therefore be secured by this latter clause of the bond, or it is not secured at all. However this may be, the sheriff is authorized to receive it when he gives the license.

The state tax on peddlers and hawkers is assessed by law, and the parish tax on them for the year 1848 was assessed by an ordinance of the police jury. We are of opinion that the sheriff was authorized to receive those taxes; but the parish tax for 1849 had not been assessed at the date of the sheriff's receipt, and he had no means of knowing what the amount of it would be. The plain-

tiff is therefore entitled to recover the sum of \$67, admitted to have been paid for the parish tax of 1849. BUFFINGTON  
v.  
DINKGRAVE.

It is therefore ordered that the judgment in this case be reversed ; and that there be judgment in favor of the plaintiff for the sum of sixty-seven dollars, with interest at the rate of five per cent per annum, from the 9th day of April 1849, till paid. It is further ordered that the costs of the district court be paid by the defendant, and those of this appeal by the plaintiff and appellee.



**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**SUPREME COURT OF LOUISIANA,**  
 AT  
**NEW ORLEANS,**  
 IN  
**NOVEMBER AND DECEMBER, 1849.**

P R E S E N T :

Hon. GEORGE EUSTIS, *Chief Justice.*

Hon. PIERRE ADOLPHE ROST,  
 Hon. GEORGE ROGERS KING, } *Associate Justices.*  
 Hon. THOMAS SLIDELL,

HILL et al. v. SPANGENBERG.

The domicil of a person is in the parish in which he has his habitual residence. C. C. 42. The expression, "if a defendant reside alternately in different parishes," in art. 166 C. P. does not mean the passing of a certain portion of the day in one parish, and the residue in another, but the dwelling certain portions of the time in one parish and certain portions in another, as in the case of winter and summer residences in different parishes.

**A** APPEAL from the Fifth District Court of New Orleans, *Buchanan, J.*  
*L. Peirce*, for the appellant, cited Digest, book 50, law 27, tit. 1, s. 1. Merlin, Domicile, ss. 2, 7. *Cole v. Lucas*, 2 An. 946. Code of Practice, 266. *Judson v. Lathrop*, 1 An. 78.

*Lockett and Goold*, for the defendant, cited C. C. 42. C. P. 166. *Tanner v. King*, 11 La. 178. Story's Conflict of Laws, ss. 46, 47.

The judgment of the court was pronounced by

SLIDELL, J. The defendant, being sued upon three acceptances, declined the jurisdiction of the Fifth District Court of New Orleans, averring his domicil to be in the parish of Jefferson. The validity of this exception is the sole question presented for our consideration.

The following facts are in evidence: The defendant, for about eighteen months previous to the institution of the suit, had been the proprietor of a large sugar plantation in the parish of Jefferson, and of one hundred and fifty slaves employed in its cultivation; during which period he had habitually slept and break-

|     |      |
|-----|------|
| 4   | 553  |
| 44  | 117  |
| 4   | 553  |
| 52  | 1308 |
| 4   | 553  |
| 111 | 929  |

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v.  
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fasted in a dwelling house upon the estate, and returned thither in the afternoon to dine, and pass the residue of the day. He was in the habit of coming daily, after breakfast, to the city, by the Carrollton railroad, and his mornings were engaged in the business of cotton brokerage in New Orleans, as a member of the firm of *Spangenberg & Mason*. At intervals, however, some days would be spent continuously at the plantation without visiting the city. His partner, *Mason*, lived in New Orleans. The defendant's wife and family had formerly resided at the north, and he was in the habit of spending his summer there; but, after the purchase of the plantation, he ceased to keep house in New Orleans, and furnished the dwelling house on his plantation, whither his wife and family removed from the north, and where they have since continued to live with him, except during the summer, when they went to the north. The defendant had voted, before the institution of this suit, in the parish of Jefferson. For many years before he bought the plantation, the defendant was domiciled in New Orleans, pursuing the business of a cotton broker. He is an owner of real estate in New Orleans. In three or four notarial acts of mortgage, &c., executed by him in New Orleans, shortly before the institution of this suit, he is described as living in New Orleans.

The provisions of our law more particularly pertinent to the present question are to be found in article 42 of the Civil Code, and articles 162 and 166 of the Code of Practice.

"The domicil of each citizen is in the parish wherein his principal establishment is selected. The principal establishment is that in which he makes his habitual residence. If he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereafter prescribed, any one of the said places where he resides may be considered his principal establishment, at the option of the persons whose interests are thereby affected." C. C. art. 42.

"It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil or residence; but that rule is subject to several exceptions." C. P. art. 162.

"If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment, or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil." C. P. 166.

Testing the case by these provisions of our code, we are clearly of the opinion that the exception must be maintained, that the defendant must be deemed a resident of the parish of Jefferson, and entitled to have his defence heard before the tribunal there. Not only is he the possessor and cultivator of a large estate there, which, in point of pecuniary importance, may be considered equivalent to his business operations in New Orleans, but it is there that he sleeps, takes his meals, spends two thirds of his time, has established his household, and surrounded himself with his family and the comforts of domestic life. His dwelling house there is emphatically his permanent home. Even if it had been proved that the yearly profits of his business as a cotton broker exceeded the revenues of his plantation, we should by no means consider that as outweighing the considerations we have just stated.

The plaintiff's counsel has cited the law 27 of the Digest, *ad municipalem*, as pertinent to the present controversy. *Si quis negotia sua, non in colonia, sed in municipio semper agit, in illo vendit, emit, contrahit, et in eo foro, balneo, spectaculis retinet, ubi festos dies celebrat, omnibus denique municipii commodis, nullis coloniaum fruitur; ibi majus habere domicilium, quam ubi colende causa diversatur.* Conceding fully the correctness of the doctrine, and its consistency with our legislation, we do not regard the case contemplated by the digest as parallel with the one at bar. The city was by no means the exclusive seat of the defendant's business; and his comforts and enjoyments were centered elsewhere. He participated in the advantages of country life, *commodis coloniaum*; and the cultivation of his plantation was an object of his daily supervision, and not of the mere occasional attention of a town resident.

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Under the article of the Code of Practice, an option is given to the creditor under certain circumstances, in case the debtor resides alternately in different parishes. We think that there is much reason for saying, with the defendant's counsel, that residing alternately in different parishes, does not mean passing a certain portion of the day in one parish and the residue in another. It would seem rather to contemplate the case of a person dwelling certain portions of the time in one parish, and others in another, as, for example, in the case of winter and summer residences. Such persons might be said to have alternate residences. But however this may be, there is a qualification in the article conferring the option upon the creditor. It is limited to those cases where the debtor's alternate residences appear to be nearly of the same nature. This cannot be said to be the case of the defendant.

The district judge appears to have considered the present case as covered by the opinion of this court in *Judson v. Lathrop*, 1 An. 79. But on recurring to the facts of that case, a very marked difference will be found from those presented here. *Lathrop* was held liable to the jurisdiction of New Orleans, because, although he spent the summer months in Feliciana, he passed the business season, or eight months of the year, in New Orleans, as a commission merchant. And the court refused to compel his creditor to go to another parish, where, during two thirds of the year, his person could not be found.

The descriptive words used in the notarial acts were admissible in evidence against the defendant, and a fair subject of consideration in connexion with other facts, in testing the question of evidence. But we do not consider such immaterial recitals, in contracts with third persons, as conclusive upon the party making them, in a contest with others upon a question of jurisdiction. As to the comparative weight of this evidence, it may be considered as inferior to another implied declaration of the defendant, on the subject of this domicile. The recital in the notarial act was immaterial, and may have been in reality the act of the notary, and not suggested by the defendant, nor noticed by him; but his voting in the parish of Jefferson was his own deliberate act, clearly implying a declaration that he resided in that parish, and involving a fraud upon the public, if that declaration was untrue.

If we reverse this case, and suppose that the present suit had been brought before the District Court of Jefferson, and the defendant had excepted to its jurisdiction, we think, under the facts shown, the exception would have been dismissed without the least hesitation. By parity of reasoning we feel bound to sustain it here.

It may be true that inconvenience to the mercantile community of New Orleans may arise from refusing to them the choice of their own forum, in pursu-



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ing debtors who reside in adjoining parishes and transact daily business here. But this inconvenience must yield to the legislative will; and, if it be an evil, must be remedied by a new expression of that will.

It is therefore decreed that the exception of domicile be sustained, and that the plaintiffs' petition be dismissed; the plaintiffs paying costs in both courts.

### HOWLAND et al. v. FOSDICK et al.

Where the owners of merchandize consigned to an agent for sale, in answering a letter containing an account of the sales, writes with full information of all the circumstances under which it was made, that "The sale leaves us a very serious loss, but we suppose you acted for the best; we should have preferred holding on to selling at such low figures," it amounts to a ratification and approval of the sale.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbrige, J. Maybin*, for the plaintiffs. *Lockett and Gould*, for the appellants. The judgment of the court (*King, J.* absent,) was pronounced by

*Rost, J.* The defendants, who are merchants in this city, shipped to the plaintiffs, in New York, in the month of August 1847, forty-six bales of cotton, and directed them at first to sell it on its arrival. They drew on the plaintiffs, at the same time, a bill for \$2,062 40, on the shipment. The plaintiffs acknowledged the receipt of the letter containing the order to sell at once, before the arrival of the ship. They accepted the bill and have since paid it.

On the 27th of September, the ship arrived at the quarantine ground, eight miles below the city of New York, and was not permitted to enter the port until the 11th of October. After her arrival, the plaintiffs frequently sent to ascertain when the cotton would be landed. It was landed on the 16th October. On the same day the plaintiffs had it hauled to their warehouses, and as soon as particable placed samples of it in the hands of two brokers. It was sold on the 23d of October, at eight cents per pound, leaving the plaintiffs uncovered to the amount of \$574 34. They sue for the recovery of this sum, which the defendants refuse to pay, on the ground that it was the duty of the plaintiffs to have sent lighters to the quarantine, as soon as it was ascertained that the vessel would be detained there, for the purpose of bringing the cotton to the city of New York, and that, by failing to do so, they violated the defendants' orders, and were guilty of gross neglect; that by reason of the delay, which occurred, the defendants lost 3 cents per pound on the cotton, and have sustained damages in the sum of \$671, which they claim in reconvention. There was judgment against them in the first instance, and they have appealed.

The reasons of the district judge in support of his decree, are as follows:

"By the bill of lading, the ship undertook to deliver the cotton in the port of New York; it was then incumbent on the defendants to have shewn some usage or custom by which the consignees were bound to send to Staten Island, and which protected the said consignees from the risk and expense of lighterage, &c., and this has not been done, to my satisfaction. On the contrary, from the occupation and long experience of the witnesses *Barstow* and *Robert*, in the New Orleans trade, I come to the conclusion that it is not the usage, nor was it the duty of the plaintiffs to send to Staten Island, unless under the special instructions of the defendants."

In this view of the facts and of the law of the case, we entirely concur. Had the vessel been compelled to discharge all her cargo at the quarantine ground, agreeably to quarantine regulations, it would have been the duty of the consignees to make arrangements with the ship for the transportation of the cotton to New York, and to see that it was transported. But, as long as there was a probability that the vessel would be permitted to enter the port with all or a part of her cargo, it was not the duty of the plaintiffs to send lighters under the alleged usage of trade.

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Uncommon diligence having been used by the plaintiffs, after the arrival of the ship in New York, there is nothing for the defence to rest upon. So far from being in any manner sustained by the evidence, it is inconsistent with the defendants' own letters and instructions to the plaintiffs. On the 23d of October, they wrote: "If the cotton is still on hand, we must leave you to exercise your own discretion as to its being sold immediately or held." On the 8th of November, they acknowledge the receipt of the plaintiffs' letter informing them of the sale of the cotton, and go on to say: "The sale leaves us a very serious loss; but we suppose you acted for the best. We should have preferred holding on, to selling at such low figures."

When they wrote the last letter they were informed of all the facts alleged in their answer, and it is to all intents a ratification and approval of the sale.

*Judgment affirmed.*

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BARELLI et al. v. LYTLE et al.

Where a commission to take testimony in another State is addressed to "any judge or justice of the peace," at the place where the evidence is to be taken, without naming any one in the commission, the party offering the commission must show directly, or by circumstances authorizing a legal inference, that the person by whom the commission was executed, was, at the date of its execution, a justice of the peace of the State into which the commission was sent. A certificate of the Governor of the State, dated subsequently to the execution of the commission, stating merely that the person by whom the commission was executed, "is a duly authorized justice of the peace and that full faith and credit are due to his official acts," not written on the same paper as the depositions, and there being no internal evidence in the papers that the justice's certificate was ever seen by the Governor, is insufficient to establish that the justice was qualified to act at the date of the execution of the commission.

**A**PPPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Josephs*, for the plaintiffs. *W. D. Hennen*, for for appellant, cited *Baine v. Wilson*, 18 La. 64. *Edmonson v. Mississippi and Alabama Railroad Company*, 13 La. 285. *Starkie on Evidence*, vol. 3, p. 1252. The judgment of the court (*King, J.* absent,) was pronounced by

**SLIDELL, J.** At the trial of this cause the plaintiff offered in evidence the return of a commission to take testimony, addressed to any judge or justice of the peace at Port Lawrence in the State of Texas. The defendant objected to the introduction of this evidence upon the ground, among others, that the certificate of the Governor of Texas, dated June 29th 1848, shows that *J. R. Baker* was a justice of the peace on that day, but does not show that said *Baker* was a justice of the peace on the 5th June, 1848, at which time the commission was executed.

The certificate is in these words :

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"Austin, June 29 1848.

"The undersigned, Governor of the State of Texas, hereby certifies that *John R. Baker* is a duly authorized justice of the peace in and for the county of Calhoun in said State, and that full faith and credit are due his official acts."

It is not written upon the same paper as the depositions, but upon a distinct sheet; the papers exhibit no internal evidence that the justice's certificate was ever seen by the Governor.

The justice not being named in the commission, it was necessary to show either directly or by circumstances authorizing a legal inference, that *Baker* was, at the date of the execution of the commission, a justice of the peace in the State of Texas. It may be, in some cases, that when the existence of a subject matter or relation has been established, its continuance may be presumed. But here we are called upon to presume, from the fact that a person was qualified to act as a justice at a particular date, that he was qualified so to act at a period anterior to that date. Such a presumption is not supported either by reason or authority.

Excluding the testimony thus taken, we are of opinion that the remaining evidence is insufficient to establish the liability of *Huntington*. The testimony of *Mansoni* would have been insufficient alone to impose upon the appellant a liability for the debt, which exceeds \$500. We do not find in the facts stated by the other witnesses a corroboration of the alleged liability. They do not point to the transaction which forms the subject of this suit; and are as consistent with the hypothesis that *Huntington* was not a silent partner of *Lytle & Rudler*, in the goods purchased of the plaintiff, as with the opposite hypothesis. Besides, it does not distinctly appear from the testimony of *Mansoni* whether the interest of *Huntington* in the adventure arose after the dealings between *Barelli* and *Lytle & Rudler*, who were charged on *Barelli's* books, or existed at the time. *Non constat* that *Huntington* may not have bought an interest subsequently, and thus have been the debtor of *Lytle & Rudler* only. See *Young v. Hunter*, 4 Taunton, 582. Story on Part. p. —, § 146 *et seq.*

As the district judge admitted the testimony under the Texan Commissions, and the plaintiff, under the circumstances, may have thought it unnecessary to adduce further evidence, we think the most proper course is to remand the cause.

It is therefore decreed, that the judgment of the district court be reversed, and that this cause be remanded for a new trial and for further proceedings according to law; the plaintiffs paying the costs of this appeal.

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#### LABRANCHE v. TREPAGNIER et al.

Where a surviving spouse, who had qualified as the natural tutrix of her minor children, causes herself to be appointed, under art. 1037 C. C., administrator of her husband's succession, there being an heir of age at the opening of the succession, and creditors, and on the day of her appointment executes a bond, with surety, for her faithful administration, in a sum fixed by the judge in virtue of the discretion reposed in him by art. 1037, binding herself faithfully to account over to the heirs, or to any other person having a right to receive the amounts of the succession." The amount of the bond being less than half the amount required in case of an appointment under art. 1041 C. C., the bond must be considered as executed only with a view to protect the interests of the creditors who had

made themselves known, and of the heirs of age, who may have been satisfied with the security which a bond of that amount offered. The surety in such a bond cannot be made liable to the minor heirs for any amount due to them from their father's succession, received and not accounted for by their mother. *Per Cur*: A surviving parent, who is the tutor of his child, is not bound to give security for the administration of his estate, the tacit mortgage on the property of the tutor affording, in the eye of the law, a sufficient guaranty for the protection of the interests of the minor. The creditors of the succession, and the heirs of age, being the only persons who could require security from the mother, it results that the security given was exclusively for their benefit.

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v.  
TREPAGNIER.

**A** PPEAL from the District Court of St. Charles, *Nicholls, J. St. Paul*, for the plaintiff. *Rozier and Hubert*, for the appellants. The judgment of the court (*KING, J.* absent,) was pronounced by

*FUSTIS, C. J.* *Leonce, Numa and Amedée Trepagnier*, the parties defendant on the record, are appellants from a judgment of the Court of the Fourth District, sitting in the parish of St. Charles, in a suit in which *Similien Labranche*, the appellee, is the plaintiff. The judgment was rendered in favor of the appellee, on a reconventional demand, set up against him by the appellants, but in their favor severally, against their mother and natural tutrix, for the sum of \$3,754, with interest. The matter in dispute between the parties is the responsibility of the appellee for these sums, being the amount of the judgment they have obtained against their mother, for their respective shares of their father's succession, on an account rendered by her as administratrix of said succession.

The district judge, whose opinion has been prepared with great care, considered that the heirs of the late *Pierre Trepagnier*, among whom are the appellants, had no legal interest in the bond given by the plaintiff and appellee, upon which he is sought to be made liable. This question is first to be examined, and, if the conclusions of the judge are concurred in by this court, no other inquiry becomes necessary.

The bond is in these words:

"Know all men by these presents, that I, *Celeste Delhommer*, widow of *Pierre Trepagnier*, as principal, do bind myself unto the *Hon. J. S. Labranche*, Judge of the Court of Probates, in, and for the parish of St. Charles, State of Louisiana, and unto his successors in office, in the just and full sum of \$46,000. And I *Similien Labranche*, of the parish of St. John the Baptiste, as security, do bind myself unto the said Judge, and unto his successors in office, for the said sum of \$46,000. The condition of the present obligation is such that, if the above bounden widow *Pierre Trepagnier* shall truly and faithfully administer the estate of the late *Pierre Trepagnier*, and faithfully account over to the heirs, or to any other person or persons having right to receive the amounts of the succession, of said late *Pierre Trepagnier*, and otherwise fulfil all the obligations of her charge, then the above bond shall be null and void, otherwise to remain in its full force and virtue.

"In witness whereof, we hereunto set our hands, and affixed our seals, in the presence of *Messrs. François Chaix*, and *Hypolite Trepagnier*, witnesses of the parish of St. Charles, this 21st day of January, in the year of our Lord 1839, being the 63rd year of the Independence of the U. S. of America.

(Signed) TREPAGNIER NEE DELHOMMER,  
SIMILIEN LABRANCHE.

F. CHAIX, H. TREPAGNIER, witnesses."

The appellants were minors at the time of the execution of this bond, and their mother was their natural tutrix. She took the oath, and obtained letters

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of tutorship, of all the minor heirs of her deceased husband, and caused an under tutor to be appointed to them. Two days before the bond bears date, *Mme. Trepagnier*, as tutrix of her minor children, applied by petition to the Court of Probates, to be appointed administrator of the succession of her husband, and the court rendered a decree on the day the bond bears date, by which she was appointed, and directing letters of administration to issue, on her taking the oath and giving the bond for the security of her faithful administration.

The appellants assume that the appointment of their mother was regularly made, and the bond given to secure the faithful administration on her part; that, by the conduct of the administratrix, the condition of the bond has been broken, and the surety is, consequently, liable to make good to them the amount of the proceeds of their father's succession still retained by their mother, for which they have judgment against her.

It is to be observed that, under the pleadings, the cause of action is confined to the responsibility of the surety for the retention of those proceeds, no other act being understood as assigned as a ground of action against the appellee in this court, or supported by evidence in the court below. The judgment of that court was for the precise sum admitted to be due by *Mme. Trepagnier* in her answer, and no application has been made to increase the amount of that judgment, in this court. Nor do the appellants represent any other interest than their own; the heir of age at the time of the decease of *Trepagnier*, is no party to this suit, and the creditors we are authorized in considering as satisfied, or having no interest in the suit.

The appointment of *Mme. Trepagnier* as administratrix appears to have been made under art. 1037 of the code, which provides that, if all the beneficiary heirs be minors, their tutors and curators can claim the preference for the administration, and it should be given them under the charge of their being personally responsible for their acts of administration, and giving security as before required, though those tutors should be the fathers or mothers of the minors. The security "before required," is mentioned in the preceding article, 1034, which provides that good and sufficient security be given for the fidelity of the administration, without fixing the amount of the suretyship, or the standard by which it is to be regulated. Article 1041, on the contrary, requires that the security to be given by administrators appointed under it, shall be one fourth beyond the estimated value of the moveables and immoveables, and of the creditors comprized in the inventory, deducting the bad debts.

It seems obvious that the amount of the suretyship to be furnished by the surviving parent, appointed to administer a succession of a deceased parent, inherited in part by minor children under art. 1037, depends upon the condition of the succession, or upon the interest the person appointed may have in it, and is a matter to be determined by the judge according to the exigencies of each case. We are satisfied that the bond in question was given and required under this article, and that the judge, in fixing the amount, had only in view the protection of the interest of the creditors who had made themselves known, and who, with the heir of age, may have been satisfied with the security which a bond of that sum offered. Had the bond been given under art. 1041, the amount would have been nearly \$110,000, whereas it is only to \$46,000. It was not unusual at the time of these proceedings, in some of the parishes of the State, to super-add the administration of a regularly appointed administrator to that of tutor, although the administration by the tutorship would have been legal and adequate of itself for all purposes.

But we consider the law as settled that, the natural tutor or tutrix has a right to administer the succession of the deceased spouse by virtue of the tutorship, unless the heirs of age or creditors require the appointment of an administrator. *Bryan v. Atchinson* 2 An. 463, and *The Succession of Story*, 3 An. 502. The surviving parent, who is the tutor of his child, is not bound to give security for the administration of his estate, the tacit mortgage on the property of the tutor affording, in the eye of the law, a sufficient guaranty for the protection of the interests of the minors. The creditors of the succession and the heirs of age being the only persons who could require security from the mother, we think it results that the security given was exclusively for their benefit, and that such is the legal intendment of the suretyship.

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The counsel for the appellants has brought to our notice the case of *Ball v. Hodge*, 11 Rob. 390, in which it was conceded that a bond given by a mother, who was administratrix, inured to the benefit of heirs. It does not appear by the result of that case that, the questions presented in this case were raised therein; they certainly were not decided by the court; nor does there seem to be any matter of law decided which is applicable to the present case. The report gives no statement of the amount of the bond in that case, nor the circumstances under which it was given.

*Judgment affirmed.*

### FRETZ et al. v. CARLILE et al.

Decisions in *Gardere v. Murray*, 5 Mart. N. S. 244, that, if a judgment be signed before the proper time, the party against whom it is rendered may move for a new trial as though the judgment had not been signed, but if, instead of doing so, he appeals, that he will be thereby precluded from urging that the appeal was not final—affirmed.

An appellant, who had been allowed by the judgment appealed from but a dividend on his claim out of the funds for distribution, who contends that the judgment was rendered without evidence, in his absence, and by consent of the other parties, cannot require an amendment of the judgment so as to allow him the whole amount of his claim out of the fund for distribution, on the ground that the other parties, by allowing him a dividend on his claim, recognized its amount. *Per Cur*: The appellant has no right to divide the consent of the other litigants, which was intended by them to facilitate the disposition of the fund in court, and made in a spirit of compromise.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Elmore and King*, for the plaintiff. *Mott*, for the appellants *Baker, Lusk & Co. Hunton*, for *Lawrence et al.* The judgment of the court (*King, J.* absent,) was pronounced by

*SLIDELL, J.* The objection raised as to the premature signing of the judgment is sufficiently answered by a reference to the case of *Gardere v. Murray*, 5 Mart. N. S. 244.

The appellants *Baker, Lusk & Co.* do not pray that the cause be remanded for a new trial; but simply that the judgment be so amended as to allow them out of the fund in court for distribution \$498 62, the whole amount of their claim, instead of \$166 21, which was awarded them by the decision of the court below. Can we give them this relief, upon their own hypothesis that the judgment was rendered without any testimony being adduced? We think not. If there be no testimony before this court, it is the intervenor's own fault. He was an actor, and should have sustained his claim by evidence. He cannot

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ask us to render a judgment in his favor, for a claim which he has not proved. Whether, under the circumstances, the appellants could have had the cause remanded it is unnecessary to say; as the point is not made, nor is that relief asked.

But while the appellants contend that the judgment of the court below was rendered without evidence and by consent of the other parties, the appellants not having appeared at the trial of the cause, they insist that they are entitled to their whole claim, because the written consent in agreeing that they should have judgment for a dividend of 33 per cent on their claim of \$498 62, thereby recognized that as the amount of their claim. But, in our opinion, the appellants have not a right thus to divide the consent of the other litigants, which was intended by them to facilitate the disposition of the fund in court, and which was made in a spirit of compromise.

*Judgment affirmed.*

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### FISK v. PROCTOR.

Compensation for injuries sustained by a purchaser in consequence of defects in the thing sold, can only be recovered in a redhibitory action, or in an action *quantum minoris*; and in either action the plaintiff must allege and prove a tender of the thing sold.

**A**PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Bartlette*, for the appellant. *L. Peirce*, for the defendant. The judgment of the court (*Rost, J.* absent,) was pronounced by

**KING, J.** The plaintiff claims in this action damages, on the ground that a slave sold to him by the defendant was an habitual runaway. There is no allegation or proof of a tender of the slave previous to the commencement of the suit, and on this ground a judgment, as in case of non-suit, was rendered in the lower court, from which the plaintiff has appealed.

He contends that this, being a suit for damages, it is not subject to the rules which govern redhibitory actions. In the case of *Richardson v. Johnson*, 2 An. Rep. 389, we hold that compensation for injuries sustained by the purchaser, in consequence of defects in the thing sold, can only be recovered in a redhibitory action, or an action *quantum minoris*, and that the forms of those actions must in such cases be complied with. Those forms have not been observed in the present instance.

*Judgment affirmed.*

### HILL v. CHATFIELD et al.

Decision in *Prewitt v. Carmichael*, 2 An. 943, that an attachment will not lie in action for damages *ex delicto*, affirmed.

**A**PPEAL from the Second District Court of New Orleans, *Canon, J. Durell*, for the plaintiff. *Eggleston*, for the appellant. The judgment of the court (*Rost, J.* absent,) was pronounced by

**SLIDELL, J.** We see no sufficient reason for disturbing so much of the judgment of the court below as condemns *Chatfield* and *Mills* personally.

But as the action of the plaintiff was founded upon tort, the attachment should have been set aside. See *Prewitt v. Carmichael*, 2 Annual 943; *Greiner v. Prendergrast*, 3 Ann. 377; *Swagar v. Peirce*, 3 Ann. 436.

It is therefore decreed that, so much only of the judgment of the court below as condemns the said *Chatfield & Mills* personally, be affirmed. It is further decreed that, in other respects, the said judgment be reversed, and that the attachment obtained by the plaintiff be dissolved, the costs of the attachment and of the appeal to be paid by the plaintiffs.

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RATHBONE et al. v. NEAL et al.

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Where a vessel, in consequence of unseaworthiness existing at the commencement of the voyage, and not from any perils of the sea or accident, is compelled to put into an intermediate port for repairs, where she is kept a much longer time than necessary to prepare her for the completion of her voyage, the owners will be responsible to the freighters for any damage resulting from the delay in the delivery of freight, occasioned by her unseaworthiness and unnecessary detention.

Where a vessel is compelled to put into an intermediate port for repairs, it is the duty of the master to cause the repairs to be made without any unnecessary delay, in order to prosecute his voyage to the port of destination. If he wait for orders from the owners of the vessel, the latter will be responsible to the freighters for any damage resulting from the delay.

Whatever care and diligence may have been shown in preparing a vessel for her voyage, and in rendering her staunch and strong, yet if, in fact, she was not so, the owners will be responsible for any damage resulting therefrom to the owners of freight, when not shown to have been caused by stress of weather or accident.

Where a vessel is compelled to put into an intermediate port for repairs, the burden of proving seaworthiness at the commencement of the voyage is on the owners of the vessel. The value of merchandize at the port of destination is the basis of valuation in contracts of affreightment.

A carrier is bound not only to transport goods entrusted to him safely, but to do so within a reasonable time; and he is bound to account for their value such as it may be at the expiration of that time. Neither the acceptance of the goods, nor the subsequent disposal of them, by private sale, by the owner, will be a bar to the action. The ascertaining of the damage sustained by the owner is a matter resting on the ordinary rules of evidence. A court has no authority to make any allowance as a fee to an expert, to be taxed among the costs of the suit. Const. art. 71.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Benjamin and Micou*, for the plaintiffs. *Josephs*, for the appellants. The judgment of the court (*Rost, J.* absent,) was pronounced by

EUSTIS, C. J. The plaintiffs shipped on board the ship *London*, for New Orleans, fifteen cases of merchandize, consisting chiefly of calicoes and prints. The bills of lading are in the usual form, and bear date the 7th of February, 1846. The ship sailed on her voyage on the 14th of that month at eleven o'clock, A.M., and arrived in New Orleans on the 22d of August, where she discharged her cargo. The cases were received by the plaintiffs, who instituted the present action against the owners of the ship for the unnecessary detention and delay in the delivery of their merchandize. They recovered judgment for the sum of \$3622 74, with interest from the date of the judgment, and the defendants have appealed.

By the log-book, at nine o'clock P.M. on the 15th February, the day after the ship sailed, she is described as *leaking badly*. No mention is made of her

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leaking, in the next day's register; but the day following the same entry is made, and is continued until the 27th. On that day the crew exhausted by the fatigue of pumping, insisted on making a port, as the leak continued to increase. The ship put into Nassau, on the 1st of March; her cargo was discharged and put in stores; she remained in that port until the 14th of July, when she sailed for New Orleans.

The grounds on which the plaintiffs rely, and on which the case has been argued before us are: 1st. That the ship was unseaworthy when she left Boston, and that her putting into an intermediate port was only a consequence of her unseaworthiness. 2d. That she was detained at Nassau a much longer time than was required to make the repairs necessary for the completion of her voyage. These grounds appear to have been fairly put at issue in the petition and answer; and the defendants adduced evidence in order to establish the sound condition of the ship at the time of her sailing from Boston, and to explain and justify the apparently extraordinary delay which occurred at Nassau. The district judge, before whom the case was tried, was of opinion that the ship was not seaworthy at the commencement of the voyage, and decided it for the plaintiffs on that ground.

The ship had received extensive repairs before the present voyage. She was at the time nineteen years old, having been built in Medford in 1827. She was rated by the inspector of insurance offices of Boston as A no. 3. We infer from the testimony that the repairs were adequate and thorough, in the judgment of the ship-wrights and of the inspector. The district judge came to the conclusion, from an examination of the log-book, that there was no weather sufficiently bad to account for the leak, which was discovered the day after the ship left her port, or its gradual increase, which did not indicate any sudden injury. Called upon to review this opinion, as a matter of fact, we concur with the district judge, considering that the weather was not at all unusual for the season of the year in those latitudes, and not sufficient to account for the condition of the ship as it is represented to be on her arrival at Nassau. And we think this conclusion is supported by other facts which appear in the case. When testifying under a commission, to the repairs of the ship previous to her voyage, at East Boston, *Snelling*, the master ship-wright and caulker, says, after giving the details: "She was repaired thoroughly, and I do not know where or how they could have spent any more money on her in the repairs, or how they could have been better done." Again, "I do not know to what cause to attribute her leaking unless to the rough weather, because she was repaired well; there was nothing that could strain that I know of." The testimony of the inspector is to the same effect.

Now the defendants in their answer charge that the damage to the ship from continued gales and storms was such as to require her to be *thoroughly repaired* at Nassau, and two of the witnesses examined at Nassau, state that she could not have continued her voyage to New Orleans, with safety to the cargo, without the repairs which were put upon her. At Nassau her bottom was overhauled and refastened where required, recaulked from keel to gunwail; sheathed with felt and wood, and the sheathing caulked and coated. And the defendants also allege that, *after regular survey and legal examination at Nassau*, it was found necessary that the ship should be thoroughly repaired &c. in order to enable her to continue her voyage. No survey, nor any thing in the shape of a legal examination, has been offered in evidence, no local or definite injury to

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the ship is mentioned, nor is her condition explained except by the testimony, in general terms, that she arrived in distress in a very leaky condition, and that the repairs put upon her were necessary; and the necessity of the repairs the defendants assume, and found upon it the excuse for the long delay. But as we have seen, there is no adequate cause which is made apparent which accounts for the condition of the ship which required her to be thoroughly repaired at Nassau, after having been, in less than two months previously, thoroughly repaired in Boston. Nor is the season of the year unimportant in considering this subject. In the latter part of spring and the beginning of summer the weather is mild, and in the voyage from Nassau to New Orleans there is little risk of meeting with storms.

A circumstance which is worthy of note is the sheathing with felt and wood, which was put on in Nassau. Her bottom appears to have been carefully examined in Boston, and there was not a worm hole to be seen in it. She had been stripped of her old sheathing and copper, but was neither resheathed or coppered again. She went to sea on what is called a single bottom, without sheathing of wood or copper. Still we find at Nassau, she could not pursue her voyage to this port in safety to the cargo without being sheathed as before described, for which no reason has been assigned in the evidence; and the necessity, if any existed, for the sheathing, must therefore rest upon the condition of the ship as before stated.

The defendants, as they were bound to do, have taken upon themselves to justify the delay in the port of Nassau, and we think have not been successful in establishing any cause for it, which, under the law, released them from the responsibility attached to carriers of goods for hire. The testimony of one of the witnesses, *Mr. Meadows*, which is especially relied upon by the defendants, is in such strict concurrence with what appears to us to be the obvious truth of the case, that without going into details on these questions of fact, we give the summary which the witness himself makes at the close of his examination: "Considering the season, the age of the ship, and the nature and value of the cargo," the witness was of opinion, that the whole of the repairs put upon the ship were necessary to render her perfectly seaworthy, and to ensure the safety of her cargo. Had they been with promptitude begun and energetically performed, six weeks would have been ample time for their completion; but they were not commenced until orders were received from the owners of the ship, and the awaiting the arrival of orders consumed the greater part of the time during which the ship lay in this port." The commencement of the repairs had been deferred by the captain, until he had communicated with the owners on the subject, who eventually sent out a vessel with supplies of materials, and orders to proceed.

Upon the hypothesis assumed by the defence, it was the duty of the captain to have caused the repairs to have been made, without any unnecessary delay, in order to have prosecuted his voyage to the port of destination, and his powers were ample to that effect. It is not pretended that there was any lack of means to meet the expenses of the repairs; and, if money could not be raised on the credit of the captain and owners, as the ship was in a foreign port, the master had authority to hypothecate her for that purpose. Why then did he put off making the repairs until he received orders from his owners, in relation to a matter of duty, upon which he was bound to act upon his own responsibility; and what valid excuse was there for this delay?

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We find also in evidence a document, bearing the signature of *Joseph Balch*, President of the Merchant's Insurance Company, and of three other Presidents of Insurance Companies, which reads thus :

" We the undersigned interested in the cargo of the ship *London of Salem, J. E. Lorett* master, as underwriters, or as owner or owners of any part of the same or otherwise, do hereby give our full assent to said ship being repaired at Nassau, New Providence, where she put in from stress of weather, in such manner as in the discretion of the master may be deemed proper, and then again take her cargo on board and proceed on her voyage to New Orleans. And we do hereby release him and the owners of said ship from any responsibility which might in such case arise from this course being taken as to her repairs, without this their especial consent." Dated *Boston, April 7, 1846.*

In reference to these circumstances which we have just stated we deem it sufficient to state that they are not explained, and that it is incumbent on the defendants to explain them, and that we think they all point to the conclusion, that the putting into the port of Nassau, and the delay there, were not caused by the perils of the sea, but by the condition of the ship, for which we have an obvious and adequate cause, to wit, her age and the recent necessity for her repairs at Boston. In such a case it is not denied that the defendants would be liable. Whatever care and diligence may have been shown in preparing the vessel for the voyage and in rendering her staunch and strong, yet if, in point of fact, she was not so, they are still responsible, and when it satisfactorily appears that no stress of weather or accident can have happened to have occasioned the injury, it is but a reasonable inference that the ship was defective at the commencement of the voyage and not seaworthy. Phillips on Insurance, p. 116.

In the case of *Snethen v. Memphis Insurance Company*, 3 Annual Reports, p. 474, which was an action on a policy of insurance on merchandize shipped on board a barge from St. Louis to New Orleans, the authorities cited by counsel were examined, and we came to the conclusion that the presumption of unseaworthiness in such cases necessarily arose ; and though not conclusive, and liable to be rebutted by evidence, it threw the burthen of proof on the insured to establish the fact of seaworthiness. In that case, as well as in the case of *Talbot v. Commercial Insurance Company*, 2 Johnson, 129, the court considered the question as turning upon the age of the vessel, there being no other cause to which the injury could be justly attributed.

For these reasons, independently of the mere delay in Nassau, which, as we have stated, we do not think satisfactorily accounted for on the opposite hypothesis assumed by the defence, we concur in opinion with the district judge, on the point of seaworthiness of the ship at the commencement of the voyage.

With regard to the amount of damages the district judge based his judgment on a report of exports. Their calculations were founded upon the value of the goods at the port of destination, in which profits to the extent of fifteen per cent on the invoices were included.

It is contended that as there was neither bad faith nor fraud on the part of the defendants, their obligations were not affected by the fluctuations of the market, and that they are only liable for such damages as entered into the contemplation of the parties at the time of the contract.

We consider the rule as settled which makes the value of merchandize at the port of destination the basis of valuation in contracts of affreightment. In the present case the operation of this rule is most just. In every port of the United

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States the seasons of business in this vast mart are perfectly well known, and that the close of Summer and the beginning of Autumn are unfavorable times for the sale of goods here, no ship master can be ignorant. The carrier undertakes to transport the goods not only in good safety but within a reasonable time, and he is bound to account for the value at the expiration of that time. It is as much a part of his contract as to deliver them in good condition; and in commercial adventures time is one of the elements upon which they are undertaken and controls their result. Nor do we think the plaintiffs have lost their rights to recover from the defendants for the delay in the delivery of the goods in consequence of having received them and disposed of a portion of them at private sale. These facts may be considered in mitigation of damages to a certain extent, but the cause of action having accrued by the delay, the carrier is obliged to make good the loss resulting from his neglect, and the acceptance of the goods, it is well settled, is no bar to the action. The ascertainment of the loss is a matter resting upon the ordinary rules of evidence. *Bowman v. Teal*, 23 Wendell's Reports, 306. We find no reason for diminishing the amount of damages allowed by the judgment.

The district judge referred the invoices, account-sales, &c., with the testimony which was pertinent, to an expert to examine and report on the several items, and ordered the sum of one hundred dollars to be taxed in the costs of the suit as a fee to the person appointed. This allowance is in contravention of the article 71 of the Constitution, which prohibits any allowance by a court, by way of fee or compensation, in any suit or proceedings, except for the payment of such fees for ministerial officers as may be established by law. The party to whom the allowance has been made is not within the exception; the allowance is consequently within the prohibition.

The judgment of the district court is therefore affirmed, with the exception of \$100 to the expert, which is annulled, reserving the rights of said expert to claim his compensation for services by him rendered; the appellees paying the costs of this appeal.

CATALOGNE v. BAURIES.

A third person, in actual possession of movables, under a *bona fide* purchase from the owner, before the issuing of a sequestration against the property at a suit of a creditor of the vendor, is entitled to hold possession, under bond, until the final hearing of the case. And where the purchaser was not made a party to the action against his vendor, he will not be precluded, under the stat. of 5 March, 1842, from bonding in preference to the plaintiff, on the ground of his having permitted ten judicial days to elapse after the serving of the sequestration without exercising the right of bonding.

The fact that an injunction bond was not signed by the surety in the presence of the clerk of the court, is immaterial, where the genuineness of his signature and his sufficiency are satisfactorily proved. The clerk's approval of the bond must be presumed from his having issued the injunction.

APPEAL from the Second District Court of New Orleans, *Canon, J. Birron*, for the appellant. *Collens*, for the defendant and intervenor. The judgment of the court (*Rost, J. absent*.) was pronounced by

SLIDELL, J. The petitioner alleged that, at various times, from 1845 to 1849, he had advanced \$1,205 to *Bauries*, who had applied it to the establishment of a

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dairy, with horses, carts, &c., for its use;* and that, to secure the advances, *Bauries* executed a sale of the establishment in his favor. That, in 1849, the defendant being in possession of the dairy, sold and delivered it to *Tisnet*, partly for cash, and partly to the amount of \$2,000, on credit; to which sale the petitioner assented, provided that he should be paid his claim out of the price. That *Bauries* has failed to pay him, and *Tisnet* has not fulfilled the conditions. He prayed for a sequestration of the cows, horses, &c., and for judgment against *Bauries* for the amount of his claim; but did not make *Tisnet* a party to the suit. The property was seized under this suit on the 7th February; but the business of the dairy seems not to have been interrupted, the sheriff having appointed a keeper who carried it on. On the 24 February, the plaintiff obtained an *ex parte* order for leave to bond the property, upon the ground that the defendant had permitted ten judicial days to elapse without exercising the right of bonding. On the same day, before this order was executed by the sheriff, *Tisnet* filed a petition of intervention; in which he alleges that he had become the *bona fide* purchaser of the property from *Bauries*, and had received possession before the institution of the suit; and that he was therefore entitled to bond it. He prayed also for the citation of the plaintiff and the defendant, and for judgment quieting him in his title and possession. In a supplemental petition, filed a few days afterwards, he reiterates his former allegations, charges that the deprivation of the possession of the property will do him serious injury, and asked an injunction. An injunction issued accordingly.

The respective rights of the plaintiff and intervenor to bond, and the right of the latter to the writ of injunction, were presented to the court below on rule. The judgment of the court below sustained the injunction, and gave the intervenor leave to bond. The cause has not been tried on its merits, and the only question now pending is, the correctness of the interlocutory decree.

At the trial of the rules, after much testimony had been taken *pro* and *con*, the investigation was arrested by an admission on the plaintiff's part, for the purposes of the rule, that all the allegations of *Tisnet's* petition were true.

We think there is no error in the interlocutory decree. *Tisnet*, for the purposes of the present inquiry, whatever may be the result of the investigation upon the merits, stands before us as a third person holding actual possession, under a *bona fide* purchase from *Bauries*, before the sequestration issued; and was therefore entitled to hold possession under bond until the final hearing of the cause, and to enjoin. Nor was the right lost by the expiration of the ten judicial days after the levy of the writ. He had not been made a party defendant, and consequently was not estopped by the lapse of time, under the statute of 1842, p. 204.

The fact that the injunction was not signed by the surety in the presence of the clerk, seems to us immaterial. The genuineness of the surety's signature and his sufficiency were satisfactorily proved; and the clerk's approval of the bond must be presumed from his issuing the writ, the order of the judge being that an injunction should issue upon a bond with a surety being given.

The affidavit for the injunction was formal and sufficient.

Judgment affirmed.

* The *vacheries* consisted of cattle, horses, carts, and the necessary utensils for carrying it on. There was no land or house sold with it. R.

WALKER et al. v. DUVERGER, Administratrix.

The rights of the spouses are governed by the law of the place in which it was their intention at the time of their marriage to establish their domicile, and which they subsequently adopted within a reasonable time.

A tacit mortgage attaches in favor of the wife, on the property of the husband, for the price of paraphernal property sold by the latter, from the date of the receipt of the price by the latter; but no such mortgage exists in favor of the wife's heirs for the price of paraphernal property alienated by the husband after her death. C. C. 2367, 2380.

A PPEAL from the Second District Court of New Orleans. *Canon, J. Rozier and Peyton*, for the appellants. *E. A. Bradford*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. *Franklin Wharton*, deceased, intermarried with *Amanda J. Walker*, then widow of *Sandifer Hoggatt*, in May 1835, in Natchez, Mississippi. At the time of the celebration of the marriage, *Wharton* was a citizen of this State, residing in New Orleans, and engaged in the practice of the law. *Mrs. Hoggatt* was on a visit to her relatives at Natchez, and was a resident of Tennessee. The intention of the parties was to live in N. Orleans, the husband's domicile. They accordingly, after a summer excursion to the north, repaired in the fall to New Orleans, where they resided until their deaths. She died intestate, in 1839, and *Wharton* in 1847.

At the time of her marriage she owned several slaves, some of whom were in the State of Tennessee, and others were hired on board of steamboats navigating the Mississippi river. *Wharton*, after the marriage, had the possession of the slaves in Louisiana, received their hire, disposed of one of them during his wife's life, and of some others after her death.

Amanda Walker's heirs are the plaintiffs in this suit. In a former action they obtained judgment for the unsold slaves. In the present, they demand from the succession of *Wharton*, the value of the slaves sold by *Wharton*, and the hire of all the slaves from the date of his wife's death.

We have no hesitation in holding that, under the facts above stated, the rights of *Mr.* and *Mrs. Wharton*, with reference to the slaves, were controlled by the law of Louisiana, the matrimonial domicile which they contemplated at the time of the marriage, and which they actually adopted within a reasonable time. *Ford's Curator v. Ford*, 2 Martin, N. S. 576; *Routh v. Her Husband*, 9 Rob. 224; *Fisher v. Fisher*, 2 An. 775; *Hayden v. Nutt*, ante p. 67.

As the slaves were the paraphernal property of the wife, the succession of *Wharton*, is bound to pay to the heirs of the wife, the price at which he and his wife sold a portion of the slaves during his wife's life-time, and the reasonable value of those which he sold after his wife's death. The succession of *Wharton* is also liable for the reasonable wages of the slaves, which, after his wife's death, he treated as his own and hired out to various persons. In estimating the claim for wages, we have made a reasonable allowance in favor of *Wharton*, for the expense of the clothing and medical attendance of the slaves, the occasional loss of time, and the expense and trouble of collecting their wages.

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It was pleaded in the answer that, the slaves were disposed of by *Wharton*, with the full knowledge and consent of the plaintiffs. The evidence on this point is not sufficient to establish an abandonment of their rights by the plaintiffs; and it is proper to add, not only that there was a probable ignorance on the part of the plaintiffs (residents of another State,) of their rights, which depended upon a question of conflict of laws, but that several of the plaintiffs are either minors, incapable of making an abandonment, or married women whose acts would require the sanction of their husbands.

We consider that a tacit mortgage attached in favor of the wife, for the price of the slave *Jenny*, sold by *Wharton* during her lifetime, at the date of the receipt of that price by him, namely, May 6 1836. *Fisher v. Fisher*, 2 An. 776; *Foster v. Her Husband*, 6 La. 27. The right having so attached and become vested in the wife, passed at her death, to her heirs.

Whether a tacit mortgage exists in favor of the wife's heirs for the price of the paraphernal property alienated by him after her death, is a very different question, and one upon which we have not been favored with argument by either party. Our conclusion upon this point is that, the wife's heirs have not a tacit mortgage in such a case.

Tacit mortgages and preferences are in derogation of common right. They are to be strictly construed, and restrained to those cases where they are clearly granted by the lawgiver. "No legal mortgage shall exist except in the cases determined by the present Code." C. C. 3280. Article 2367 grants a legal mortgage in favor of the wife, "where the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same to his individual use." But the language of the article does not fairly comprise the heirs of the wife, so as to give them a legal mortgage for the price of the paraphernal property sold and appropriated by the husband after her death. Nor was there the same reason for their protection, as the lawgiver contemplated in the case of the wife herself. Subjected as the wife is, to the moral control and influence of her husband, there was a reason for interposing in her favor the safeguard of a legal fiction. No such reason exists in favor of the wife's heirs.

It is therefore decreed that the judgment of the district court be reversed. It is further decreed that the plaintiffs recover of the defendant, as administratrix of the succession of *Franklin Wharton* deceased, to be paid in due course of distribution of said estate, the sums following, to wit: the sum of \$1,000, the price at which the slave *Jenny* was sold, for which price the plaintiffs are also decreed to have a legal mortgage, dating from the 6th May 1836; the further sum of \$500, the value of the slave *Spencer*; the further sum of \$400, the value of the slave *John Hoggatt*; the further sum of \$550, the value of the slave *Priscilla*; the further sum of \$2,520, for wages of slaves after said *Mrs. Wharton's* death: the sums aforesaid to bear interest from the judicial demand, March 31 1848. It is further decreed that the costs of this suit in both courts be paid by the said succession.

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SUCCESSOIN OF DUPUY.

Where the legatees named in a testament die before the testator, and there are no debts to pay, the appointment of an executor becomes inoperative. The appointment of an

executor is a mandate, which, under our law, is limited to the execution of the legacies contained in the will, and to the payment of the debts, and the powers which it gives are to be strictly construed. SUCCESSION OF
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The appointment of an executor with the origin of the succession, is not a substantial testamentary disposition, independent of any other.

The seizin of an executor is a fiction of law, which does not interfere with the legal possession of the heir.

The admission of a will to probate, and the order given for its execution, are mere preliminary proceedings, necessary to the administration of the succession; but they do not amount to a judgment binding on those not parties thereto.

A PPEAL from the First District Court of New Orleans, *M'Henry, J.*
Buisson, for the appellant. *Grailhe*, contra. The judgment of the court was pronounced by

ROST, J. The late *George Dupuy* died in France, sometime in December 1848. During his previous residence in this city, he made an act of last will containing but one disposition, a universal bequest in favor of his brother *Joseph Dupuy*. He appointed *Antoine Michoud* his executor. On the next day he made a codicil, ordering his executor to emancipate his slave *Betty*.

Soon after being informed of the death of the testator, the executor named probated the will and the codicil, and took out letters testamentary. He caused an inventory and appraisal of the property of the succession to be made, when a suit was instituted against him by the appellee, one of the legal heirs of the deceased, praying for the rescision of all these proceedings, and for the setting aside of the will and codicil, on the ground that the legatee therein named had both departed this life before the death of the testator, and that there was no longer any will to execute. In the petition presented by him to that effect he contends that, the succession of the deceased ought to be administered as a succession *ab intestato*, and prays to be appointed curator to the absent heirs.

The executor answered that the appointment of a testamentary executor with the seizin is, *per se*, a testamentary disposition which confers upon the executor the right of administering the succession, and of receiving a commission at the end of his administration; that, as long as the seizin is not taken from him by the heirs in the mode pointed out by law, no part of the succession can be considered as vacant; and finally, that the appointment of a curator to the absent heirs could not divest the executor of his trust, nor of his right to administer the succession.

The district judge gave judgment in favor of the appellee, annulling the order confirming *Michoud* as executor and setting aside the letters testamentary. A suspensive appeal was taken from that judgment. Sometime after the court appointed the plaintiff curator to the absent heirs, as prayed for by him. Another appeal was taken from the decree making that appointment.

The appointment of an executor with the seizin is not, as alleged, a substantive testamentary disposition, independent of any other. The functions of a testamentary executor are a mandate, differing from other mandates in this only, that it begins at the death of the principal when all other mandates end. That mandate, under our laws, where it is not enlarged by the will, is limited to the execution of the legacies contained in the will and to the payment of the debts, and the powers which it gives are to be strictly construed. *Delisle*, Commentaries on Art. 1024 Nap. Code.

There being no testamentary dispositions to execute, and no debts to pay, in this case, the appointment of the defendant as executor has become inoperative.

SUCCESSION OF
DUPUY.

It is well settled that the seizin of the executor is a fiction of law, which does not interfere with the legal possession of the heir; and also that, the admission of a will to probate and the order given for its execution are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties thereto. Pothier, *Dispositions Testamentaires*, art. 2, ch. 5, p. 360. *Succession of Duplessis*, 10 Rob. 194. We are of opinion that there is no error in the judgments appealed from.

Judgment affirmed.

M'KENZIE et al. v. WARD.

Where the endorser of a bill payable in this State is not shown to have had, when the bill was presented for acceptance and payment, a permanent residence here, but to have been doing business here during the winter and returning to the north in the summer, a notice of protest addressed to him at the north, during his absence from the State, to the care of a person, to whose care a witness testified that the endorser had requested him to direct his letters, accompanied by proof that he had received a private letter directed to the same address, informing him of the protest, will be sufficient.

APPEAL, from the Fifth District Court of New Orleans, *Buchanan, J.*
Honor for the plaintiffs. *Benjamin and Micou*, for the defendant. The judgment of the court was pronounced by

ROST, J. This is an action upon a bill of exchange, to the order of and endorsed by the defendant. The defence is want of notice of protest; and also equities against the bill in the hands of the original holder, which it is alleged were known to the plaintiffs when they took the bill. The defendant has appealed from the judgment rendered agreeably to the prayer of the petition.

There being no evidence in the record to show want of good faith, or knowledge of the equities alleged in the plaintiffs, the only ground of defence necessary to be examined is that of want of notice of protest.

It is not shown that, when the bill was presented for acceptance and for payment, the defendant had a permanent residence in Louisiana. He was doing business in New Orleans during the winter months, and returned in the north early in summer. *Lonsdale*, one of the witnesses, states that he went with the defendant to the north a few weeks before the protest of the bill, and that he was requested by the said defendant to write to him at New York, to the care of *A. Casselli*. *Hawthorn*, another witness, testified that he was in the plaintiff's employ, and told the clerk of the notary who protested the bill, that the notice of protest addressed to the defendant, to the care of *A. Casselli*, New York, would reach him. The witness wrote to him under the same direction to inform him of the protest, and he since admitted that he had received the letter.

The notary certifies that he served the notice of protest by directing them to the defendant, care of *A. Casselli*, New York. It appears to us that no greater diligence could have been used, and that the notices thus given were sufficient in law, under a fair extension of the rule recognized in the case of *Carmens v. Bank of Louisiana*, 1 An. 369.

Judgment affirmed.

SALOY v. PEPIN.

Where, by the terms of a building contract, the price is payable in seven instalments, and the proprietor accepts an order drawn upon him by the undertaker in these words: "accepted, payable according to agreement with the builder, on the last payment I have to make to him according to contract," and, the undertaker after receiving the first instalment, and a second payment in advance, abandons the work, the person in whose favor the order was made cannot recover its amount from the proprietor, who had nothing more to pay to the undertaker.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Buisson*, for the appellant. *Pepin*, defendant, *pro se. Le Gardeur*, appeared on the same side. The judgment of the court was pronounced by

Rost, J. This suit is brought upon a conditional acceptance of the defendant. A small portion of the claim only having been allowed by the district court, the plaintiff has appealed, and the defendant asked that the judgment be amended and rendered in his favor.

D. T. Glenn having entered into a building contract with the defendant, gave an order upon him to the plaintiff for the sum of \$476, to be deducted from the last payment on the building contract. The acceptance of the defendant is as follows: "This order is accepted, payable according to agreement with *Mr. Glenn*, on the last payment I have to make to him, according to contract."

It is alleged in the petition, and in argument, that the order was given for materials furnished by the plaintiff, and used by *Glenn* in the buildings of the defendant. But there is no evidence of that fact, and we cannot notice it. There is nothing in the record to change or vary the import of the written acceptance. It is free from ambiguity; and clearly subjected the right of the plaintiff to recover, to the eventualities of the building contract. This contract was for the sum of \$4,739, payable in seven instalments, the last instalment being for the sum of \$982, payable by a note at six months, when the buildings, cisterns, paving, and all other appurtenances thereto were completely finished, and the keys delivered."

Glenn received the first payment of \$500, and a second payment of \$1000, after which he abandoned the contract. He was notified by the defendant to proceed with the execution of it; and, having failed to do so, the defendant completed the buildings himself, and spent in so doing a larger sum than he was to pay *Glenn*.

At the time the contract was broken, the defendant was in advance to *Glenn*, and the last instalment had not matured; after that time, he could have nothing more to pay under it.

The district judge was of opinion that, as the defendant had assumed the payment of materials, and owed nothing to *Glenn* when he paid him the sum of \$1000, that payment must have been made in anticipation of subsequent instalments, and should be considered as not made, so far as the plaintiff was concerned. Deducting this sum from the credits of the defendant upon the building contract, the judge found a balance of \$61, which he allowed the plaintiff.

We are unable to concur in this opinion. If it were admitted that the rule of law invoked by the judge is applicable to a case like this, there remained four

SUCCESSION OF DUPUY. It is well settled that the seizin of the executor is a fiction of law, which does not interfere with the legal possession of the heir; and also that, the admission of a will to probate and the order given for its execution are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties thereto. Pothier, *Dispositions Testamentaires*, art. 2, ch. 5, p. 360. *Succession of Duplessis*, 10 Rob. 194. We are of opinion that there is no error in the judgments appealed from.

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It is alleged in the petition, and in argument, that the order was given for materials furnished by the plaintiff, and used by *Glenn* in the buildings of the defendant. But there is no evidence of that fact, and we cannot notice it. There is nothing in the record to change or vary the import of the written acceptance. It is free from ambiguity; and clearly subjected the right of the plaintiff to recover, to the eventualities of the building contract. This contract was for the sum of \$4,739, payable in seven instalments, the last instalment being for the sum of \$982, payable by a note at six months, when the buildings, cisterns, paving, and all other appurtenances thereto were completely finished, and the keys delivered."

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The district judge was of opinion that, as the defendant had assumed the payment of materials, and owed nothing to *Glenn* when he paid him the sum of \$1000, that payment must have been made in anticipation of subsequent instalments, and should be considered as not made, so far as the plaintiff was concerned. Deducting this sum from the credits of the defendant upon the building contract, the judge found a balance of \$61, which he allowed the plaintiff.

We are unable to concur in this opinion. If it were admitted that the rule of law invoked by the judge is applicable to a case like this, there remained four

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payments to be made when *Glenn* abandoned the contract. It was not stipulated that the advance of \$1000 should be deducted from the last payment; and, in default of any stipulations, this advance would have been compensated and extinguished by an equal amount of the first instalments due.

It is urged that the defendant had not shown that he had informed the plaintiff of the default of *Glenn*. It is proved that the plaintiff was apprized of it, and that he furnished materials to the defendant after *Glenn* had abandoned the buildings.

If that evidence was not in the record, we would hold that the plaintiff was bound to show affirmatively the execution of the contract out of the consideration of which he is to be paid.

As the case is placed before us, the judgment must be for the defendant. It is therefore ordered that the judgment in this case be amended, and entered in favor of the defendant, with costs in both courts.

LEWIS v. WILDER.

In an action here on a judgment obtained in another State, the testimony of a witness on the part of the plaintiff to show that the person in whose favor the foreign judgment was rendered was the mere agent of the party in whose name the action on it was commenced in this State, cannot be excluded on the grounds that such proof could only be made contradictorily with the person in whose favor the judgment was obtained, and that the transcript of the foreign proceedings, introduced by the plaintiff, could not be contradicted by testimonial proof. The testimony does not contradict the record, but shows a matter not apparent on it and not inconsistent with it; nor is it necessary to make the plaintiff in the foreign proceedings a party, in order to establish that the person who sues here is the real owner of the judgment.

In an action in this State on a judgment obtained in another State, the foreign judgment, in the absence of any evidence impeaching the judgment, must be considered conclusive of matters properly investigated in the original action, as of the right of the plaintiff to sue, &c.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* *Stockton and Steele*, for the appellant. *Culbertson and Ardry*, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This is an action upon a judgment rendered in Mississippi, after personal citation and issue joined, in an action entitled "*Edward W. Jones, survivor of Jones & Ballard, use of Edward G. Wood v. William R. Wilder*," whereby it was adjudged "that the plaintiff, survivor, use as aforesaid, recover of the said defendant the sum of \$304 13 and costs," &c. The plaintiff alleges that *Wood* was, in that proceeding, the mere agent of him, the plaintiff, the real owner of the judgment. There was a judgment of non-suit in the court below, from which the plaintiff appealed, and has argued the cause here *ex-parte*, no argument having been presented by the appellee. We shall direct our attention to the bill of exceptions taken by the defendant, and to the evidence offered at the trial.

The testimony of a witness for the plaintiff was taken by commission, and comes up in the transcript. By this testimony it is shown that, a judgment obtained in Mississippi by A. for the use of B., is, by the law of that State, the property of B. It was farther shown that the witness was the Attorney

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for the plaintiff, in the action in Mississippi; that *Wood* was, in that action, the mere agent for *Lewis*; and that the name of *Wood* was used in the prosecution of the suit merely to save the necessity of giving security for costs, *Wood* being a resident of that State, and *Lewis* of Kentucky. To the admission of this testimony the defendant objected, "because such proof could only be made contradictorily with *Wood*, or his heirs, and also because the proof made by the record which plaintiff had introduced, could not be contradicted by the testimony." The court sustained these objections, and the plaintiff took his bill of exceptions.

We think the court erred. Such testimony does not contradict the record; but shows a matter not apparent on the record, nor inconsistent with it. The apparent interest may be in one man, the equitable interest in another. If the defendant had an equitable defence against *Wood*, it would be a reason for so far disregarding the real interest of *Lewis*, as to let in such equitable defence against him; but it is not pretended that any such equity existed.

As to the other ground presented by the bill, to wit, that such proof could only be made contradictorily with *Wood*, it is also untenable. The question is one of fact. Is *Lewis* the real owner of the judgment, or is he not? If he is, he is entitled to recover in this action, and without making *Wood* a party. We may also observe that the plaintiff alleged that *Wood* was merely his agent in obtaining the judgment, and the defendant, without excepting, joined issue specially upon that allegation.

As to the right of *Jones*, as survivor of *Jones* and *Ballard*, to sue for the use of *Wood*, and transfer the claim to him, that was a matter proper to be investigated in the original action, and the judgment of the court of Mississippi must be taken as concluding that point, in the absence of any evidence impeaching the judgment.

As to the matters pleaded in compensation, there is a conflict in the testimony of the defendant's own witnesses; and the defence on that score fails.

We cannot allow interest at eight per cent according to the alleged law of Mississippi, it not being proved.

It is therefore decreed that the judgment of the district court be reversed, and that the plaintiff recover of the defendant the sum of \$338 63, with interest from judicial demand, to wit, 4th January 1847, and costs in both courts.

SALAUN v. RELF et al.

Where a purchaser executes a mortgage on the property purchased, in favor of his vendor, to secure the payment of a bill drawn by them on a third person, in favor of their vendor, for the price, the act reciting that a special mortgage is retained on the property in favor of the vendor or any other holder of the bill, but not stipulating that the acceptor of the bill should have the benefit of the mortgage, on paying the draft without having been put in funds by the drawers and without being bound as to them to pay it, if the bill be paid by the acceptor at maturity without any subrogation from the creditors at the time of payment, the debt will be extinguished as to third persons and the mortgage cease to operate adversely to other mortgage creditors. *Per Cur*: The debt, as recited in the act of mortgage, was the debt of the acceptor; the draft makes him the principal debtor; and, on paying it, he paid his own debt, which the mortgage was given to secure. The creditor was paid; and as no other object was disclosed in the act of mortgage, and as there is no reser-

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vation or qualification contained in it, the mortgage cannot be kept alive for any other ulterior object, or for the benefit of any other person, unless it result from the tenor of the draft itself.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. A. Denis*, for the plaintiff and appellant. *J. & H. H. Strawbridge, contrd.* The judgment of the court was pronounced by

EUSRIS, C. J. The plaintiff took out an execution on a judgment he had obtained against the defendants, by virtue of which the sheriff seized upon certain slaves. The object of his demand in the present case is, to remove the encumbrance on the slaves resulting from a certain mortgage of which *Christoval Toledano* claims the benefit, and who is the antagonist party insisting on his right of mortgage. After hearing the evidence and argument, the district judge discharged the rule taken by the plaintiff for the purpose of having the mortgage cancelled, on the ground of the validity of *Toledano's* right therein; and from this judgment the plaintiff has appealed.

The act of mortgage bears date the 14th of February 1848. It is executed by the defendant and *John Arnold Weysham*, to secure the payment of a certain draft drawn by them on *Christoval Toledano*, and accepted by him, for \$6,700, dated on the day of the act and payable on the 1st of June 1849. The draft was in favor of *Bell & Stebbins*, or order, who had by the same act sold several slaves to *Relf & Weysham*, of which slaves those seized formed a part, and for which the draft had been given and received in payment. The act recited that the special mortgage is retained on the slaves, to secure the payment of the draft, in favor of the vendors, on the person or persons who may afterwards hold said draft.

The draft was paid at its maturity by *Toledano*, without any subrogation from the creditors at the time of payment, and the question presented is whether, by this payment of his acceptance, the debt, as to third persons, was extinguished, or whether it still remained as a subsisting obligation between the drawers of the bill and the acceptor, and whether the mortgage continued operative adversely to other mortgage creditors.

The debt, as the act of mortgage recited it, was the debt of *Toledano*; the draft itself makes *Toledano* the principal debtor; and, in paying his draft, he paid his own debt, which the mortgage was given to secure. The purpose of the mortgage was accomplished, the creditor was paid, and as no other object is disclosed in the act of mortgage, and as there is no reservation or qualification contained in it, it seems to us clear that the mortgage cannot be kept alive for any other ulterior object, or for the benefit of any other person, unless it results from the tenor of the draft itself. The form of the obligation which is recorded, and is the basis of the mortgage is, we think, under an hypothecary system of necessity, obligations on the parties, as it is all the information the public have to look to. They are strangers to the secret equities subsisting between the parties, and only act upon the record as it stands. If it was intended that *Toledano* should have the benefit of this mortgage on paying the draft, without being put in funds by the drawers, or bound as to them to pay it, it ought to have been stipulated in the act. *Flamisher v. Bikland*, 5 Rob. 208. If this view of the subject be correct, and we are satisfied that it is, it becomes unnecessary to consider the attempts to revive or restore the mortgage subsequent to the payment of the debt by the principal debtor.

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We have not overlooked the fact that a sale made on the 3rd October 1848, by *Weysham* to *Relf*, of *Weysham's* univided half of the slaves, was recorded in the mortgage office on the 11th October 1848. This recording preserved from the last named date the vendor's privilege arising from that sale. But before *Weysham* sold, to wit, on the 28th September 1848, the judgment of *Mrs. Salaun* against *Weysham* was recorded in the mortgage office. It therefore is clear that the vendor's privilege in favor of *Relf* upon the individual half arising from the sale by him to *Weysham* and the recording thereof, is secondary to the judicial mortgage against *Weysham* in favor of *Mrs. Salaun*.

It is ordered that the judgment of the court below be reversed, and that the mortgage of the 14th February 1848, in favor of *Bell & Stebbins*, and the subrogation to said mortgage in favor of *C. Toledano*, dated 7th February 1849, be postponed after plaintiff's judicial mortgage against *Relf*, as far as they bear upon the slaves *Henry*, *Randall* and *Sarah* and child; and that the plaintiff be paid in preference to said mortgage and subrogation out of the proceeds of said slaves; the costs of both courts to be paid by the appellees.

SUCCESSION OF PERRY.

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Where one, who had opposed the homologation of a final tableau of distribution presented by an executor, on which a judgment was rendered approving the payments made by the executor and allowing all the claims against the succession except one set up by the opponent, to whom the usufruct of the succession had been bequeathed, against the universal legatee after the expiration of the usufruct, and ordering another account to be rendered settling the respective rights of the opponent and the universal legatee, appeals as against the universal legatee, from the judgment, without making the executor a party, the appeal must be dismissed.

A PPEAL from the District Court of Jefferson, *Clarke, J. Le Gardeur*, for the appellant. *Rémy, contrd.* The judgment of the court was pronounced by

ROST, J. The executor having filed his final tableau of distribution, in this case, it was opposed by *Michel Perry*, the husband of the deceased, who has, under the will, the usufruct of his wife's property, and who claims different sums of money from the succession of his wife, and from the community which existed between them.

The tableau was also opposed on various grounds by *Mrs. Justine Lefebvre*, who is the universal legatee of the testatrix at the expiration of the usufruct created in favor of *Michel Perry*, and who claims alimony from him, under an alleged condition in the will. She also claims to be a creditor of the succession.

The judgment of the court was that the payments made by the executor be approved, and that the claims against the succession and community, as exhibited on the tableau, be allowed, except the claim of *Michel Perry*, which must be settled by compensation. The judgment then continues as follows: "And considering that the opposition and conflicting claims of *Mrs. Lefebvre* and *Michel Perry*, as to the disposition to be made of the balance remaining in the hands of the executor after making the payments herein ordered, will be more properly settled in another and final account. It is further ordered that said executor do file another and final account, exhibiting clearly the respective

SUCCESSION OF *rights of Michel Perry and Mrs. Lefebvre* to such balance as shall remain in his hands, after making the payments herein ordered, reserving to said parties to oppose said tableau when presented."

Michel Perry has appealed from this judgment, against *Mrs. Lefebvre* alone. The executor, not having been made a party to the appeal, the decree remains in full force ; and, so long as it stands unreversed, it is binding upon the opposers.

Appeal dismissed.

SUCCESSION OF LEE.

A sale of the moveables of a succession made by an administrator, under an order of court for the payment of debts, though far less than their appraised value, will not render the administrator liable for the difference between that value and the price at which they were adjudicated, where the evidence shows that they were sold for their full value, and that the succession sustained no injury thereby.

Decision in the case of *Macarty's Succession*, 3 An. 517, as to the fees of counsel and the character of the evidence by which courts should be governed in deciding on such claims, —affirmed.

Where an administration instead of being beneficial, has been injurious, to a succession, the administrator will not be allowed commissions.

An administrator who renders an account is bound to prove the items of his account by evidence, and may be held to strict proof of them by the parties interested, without a formal opposition on their part.

APPEAL from the District Court of Plaquemines, *Rousseau, J. Frost*, for the appellant. *Lombard, contra*. The judgment of the court was pronounced by

KING, J. *Lee* died in February, 1847, leaving a succession, consisting chiefly of a tract of land on the Mississippi river and of about twenty slaves. At the time of his death he was engaged in clearing the land for the purpose of cultivation, and in selling the wood for fuel. Shortly after his death, *Ronquillo* caused himself to be appointed administrator of the succession. An inventory was made, and, by the advice of a family meeting, a sale of the whole property was ordered ; but, failing to produce the price of appraisement at the first exposure, no adjudication was made. A re-appraisement was advised and ordered, but appears never to have been made. During the interval between the inventory and the sales which were subsequently made, the management of the property was confided to an overseer, employed by the administrator. In the month of September, the administrator applied for a sale of the moveables for cash, alleging their perishable nature, their exposure to deterioration and loss, and the indebtedness of the succession. A sale for cash was ordered by the judge. Under the denomination of moveables, were sold the horses, cattle, and plantation tools generally. There was also sold a large quantity of cord-wood, far below its appraised value. The remaining articles produced, in the aggregate, their appraisement.

Immediately after this sale a tableau of distribution of the fund thus produced was filed by the administrator ; and, some time after the sale of the remaining property, which occurred in February, 1848, a second tableau was filed. Both were opposed by *Mrs. M'Comas*, the grand-mother of the minor children of the deceased.

The opponent claims: 1st. That the administrator be held liable for the loss sustained on the sale of the moveables, which, it is alleged, were illegally adjudicated below their appraised value, and at a great sacrifice. 2d. That the administrator be charged with the hire of the slaves while they were in his possession as administrator, on the ground that through his negligence and mismanagement, they were not profitably employed during that time, but, on the contrary, were a source of heavy expense to the succession. She also opposed the following claims: 1st. That of *L. Lombard, Esq.*, for \$700, for professional services as an attorney, on the ground that the demand is excessive and disproportioned to the services rendered. 2d. The claim of *Le Riche*, for his wages as overseer or manager for eleven months. 3d. The commissions of the administrator. Other items were opposed, to which it is unnecessary to advert, as the oppositions were sustained, and the judgment in those respects, has been acquiesced in.

The district judge reduced the claims of *Lombard*, and *Le Riche*, and allowed the administrator his full commissions. The opponent is dissatisfied with the judgment, and has appealed.

1. Under the evidence, we think, that the administrator cannot be held answerable for the difference between the appraised value and the price produced by the articles sold as moveables. The succession was, at the time, indebted, and there appears to have been a necessity for a sale of at least a part of its effects. A family meeting had previously advised the sale of the whole property, which, as we have seen, was not made in consequence of the high appraisement, and a re-appraisement was ordered. The agricultural season was passed, and the implements of husbandry were no longer needed. The cordwood was decaying, and daily deteriorating in value. All of the articles sold were perishable, and the moment selected for the sale is not shown to have been unpropitious. It is further to be observed that, the sale was made under the order of the judge, and was not opposed. The loss sustained was upon the wood, of which there were about 1,700 cords, appraised at \$4,317. It brought at the sale but \$545. But the reason of this discrepancy in price is satisfactorily shown. It was, in the first instance, appraised too high, and at the time of the sale had so much deteriorated in value by decay, that a large portion of it was abandoned by the purchasers as being unfit for use. The evidence, we think, shows that the articles sold as moveables brought their full value, and although the adjudication below the appraisement may not have been strictly legal, it appears to have resulted in no loss to the succession, for which the administrator can be held liable.

We think however, that the administrator acted unwisely in causing to be sold the tools, carts, and teams, necessary for carting and hauling wood, which should have been reserved for use until the sale of the land and slaves. But this enquiry more properly belongs to the suit instituted to remove him from his trust.

II. The second ground is not sustained by evidence. It is true that the property was so mismanaged by the administrator, as to remain wholly unproductive while under his care. But there is no evidence in the record which enables us to determine what loss resulted from this mal-administration.

III. With regard to the fees of counsel, and the character of the evidence by which courts should be governed in determining upon such claims, our opinion has been so fully expressed in the case of *Macarty's Succession*, 3d An. Rep. 517, in which we embodied and adopted the opinions of our predecessors in the

SUCCESSION OF cases of *Dorsey* (5 Mart. N. S. 401), and *Stein v. Bowman*, (9 La. 284), that
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we deem additional remark unnecessary, further than to observe, that the reasoning and the principles established in those cases are strictly applicable to the facts of the present.

The services which the counsel in the present instance was called on to perform were of the simplest kind, requiring neither labor nor research. After a careful examination of the record, we think that \$150 is an ample compensation for the services rendered to the succession, and we reduce the claim to that sum.

IV. The claim of *Le Riche*, we are of opinion should be further reduced.

It is shewn that he was a young man without experience either as a planter or as an overseer, who had never before had the management of a plantation or slaves. A short time prior to being employed by the administrator, he had offered his services as an overseer to a planter of the neighbourhood, at \$300 a year, saying that he was without experience, and desired to become acquainted with the business. The administrator employed him at \$2 50 per day. The highest rate fixed by the evidence, for the services of a competent and good manager, is from \$400 to \$500 a year. The incompetency of *Le Riche* is conclusively shown. We think that \$275 would be a full compensation for his services in taking care of the property, which is at the rate that he himself desired to engage in similar service a short time previously.

V. For the reasons stated in the case of *M'Comas v. Ronquillo*, we are of opinion that the administration of the defendant so far from having been beneficial has been injurious to the succession, and that the administrator is entitled to no commissions.

On the trial, the counsel for the opponent required proof of certain claims placed on the tableau. The judge however dispensed with proof, and ordered the claims to be paid, on the ground that they had not been specially objected to, and a bill of exceptions was taken to his opinion.

We think that the judge erred. An administrator is bound to substantiate the items of his account by evidence, and may be held to a strict proof of them by the parties in interest, without a formal opposition. For the purpose of enabling the administrator to establish those claims, it becomes necessary to remand that part of the case.

It is therefore ordered that, so much of the judgment of the district court as decrees the payment of five hundred dollars to *L. Lombard*, of six hundred and sixty dollars to *Le Riche*, of commissions to the administrator, and the claims numbered 3, 8, 9, 10, 17, and 22, on the first tableau filed, be reversed. It is further ordered that the credit for the payment of the claim of *L. Lombard* be reduced to one hundred and fifty dollars; that the credit for the payment of *Le Riche* be reduced to two hundred and seventy-five dollars; and that the commissions of the administrator be disallowed. It is further ordered that the cause be remanded, for the purpose of enabling *M. Ronquillo* to adduce proofs in support of the claims numbered 3, 8, 9, 10, 17, and 22, of the first tableau filed. In other respects the judgment appealed from is affirmed, and *Manuel Ronquillo* decreed to pay over to the tutor of the minor children of *James Lee*, deceased, the balance remaining in his hands, after retaining a sum sufficient to meet the claims numbered 3, 8, 9, 10, 17, and 22, on the first tableau, in the event of his being hereafter decreed to pay the same. The costs of this appeal to be borne by the succession.

VASON v. CLARKE.

Where a garnishee is interrogated by a plaintiff as to the time when a note, which had been in the garnishee's possession, was delivered to a third person, and the fact is important to the plaintiff, inasmuch as the note, if in possession of the garnishee at the time of service of the interrogatories upon him, would be subject to plaintiff's seizure, a failure of the garnishee to state in his answers the date of the delivery will be considered as a confession that he had the note in his possession when the process was served upon him.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan J. Vason*, plaintiff, *pro se*. *J. G. Howard*, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiffs having issued an execution upon a judgment previously obtained against *Clarke*, made *Reigart* a garnishee, and propounded interrogatories to him. The judge considered the neglect of the garnishee to answer a part of the second interrogatory as a confession that he had in his hands funds of the debtor at the date of the service, and condemned him to pay the amount of the judgment. *Reigart* has appealed.

The second interrogatory propounded to the garnishee, after enquiring whether he had in his possession property, rights, or credits of the defendant, and their amount, concluded as follows: "What have you done with the same? If you have transferred or delivered the same to any person, say *when*, and to whom was the same delivered, and why was transfer or delivery made?"

The answer to this, as well as to a preceeding interrogatory, is as follows: "I did have recently in my possession a note drawn by *P. F. Kendall*, dated April 3, 1847, for three thousand dollars, payable to the order of *Dr. Maddox*, and by him endorsed in blank, and also endorsed by *Thos. Clarke* in blank, which note was put in my hands by *Thos. Clarke* for collection, he representing to me at the time that it was the property of his wife, and that he was acting as her agent. I received said note about the middle of February last. *Maddox* resides on Red River, and was at that time expected in New Orleans. *Maddox* did come to town. I saw him, but was unable to effect any arrangements with him. I returned said note *subsequently* to *Mrs. Clarke*, wife of *Thos. Clarke*, and received from her the acknowledgment which I had given to her individually."

It will be perceived that it is not stated *when* the note was returned, and this it was important to ascertain, as the note became subject to the plaintiff's seizure, if it was in the possession of the garnishee at the date of the service of the interrogatories upon the latter. Acts of 1839, p. 166, sec. 13. The plaintiff thereupon took a rule on the garnishee, to show cause why a judgment should not be rendered against him, in consequence of his neglect to answer the enquiry, "*when* he delivered the note, of which he once had possession, to the defendant *Clarke*."

Although an opportunity was thus afforded of amending his answers, the garnishee declined to avail himself of it. and filed no answer to the rule. His refusal to answer the interrogatory creates the presumption that the answer, if given, would have been favorable to the plaintiff; and the district judge did not, in our opinion, err in considering it as a confession that the garnishee had the note in

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his possession at the date of the service of the process upon him. C. P. arts. 262, 263.

There is no proof in the record that the note belonged to *Mrs. Clarke*. She is not shown to be separated in property from her husband; and the note being in the possession of *Clarke*, must be presumed to be his.

Judgment affirmed.

CUDDY et al. v. BELLEVILLE IRON WORKS COMPANY.

Where an actual citation is necessary, and its omission is attributable to the fault of the appellant, the appellee, upon a motion seasonably made, has a right to require the dismissal of the appeal.

Where a judgment was rendered and signed by a district court, for the city of New Orleans, during the month of June, an order of appeal granted upon motion in open court, in the month of July following, will not, under the Statute of 22d March, 1843, relieve the appellant from the necessity of citing the appellee; such citation being dispensed with only where the motion has been made within the same calendar month in which the judgment was signed. The Statute of 1843 is applicable to the present district courts of New Orleans, not having been repealed by the Statute of 30th April, 1846, organizing those tribunals.

The terms of the district court of New Orleans must be considered, for the purpose of appeal under the Statute of 22d March, 1843, as monthly, although, in fact, those courts sit continuously from November to July.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. A. Denis*, for the plaintiffs. *E. A. Bradford*, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. There is a motion in this case for the dismissal of the appeal, upon the ground that the appellee has not been cited, and that the absence of citation is attributable to the fault of the appellant, and not of the clerk or sheriff.

It is conceded that there has been no actual citation; and we deem the point to be well settled that, where an actual citation is necessary and its absence is attributable to the fault of the appellant, the appellee upon a motion seasonably made has a right to require the dismissal of the appeal.

It is therefore indispensable to inquire whether in this case actual citation was necessary. And this question depends upon the solution of the point, whether, when a judgment is rendered and signed in the month of June by a district court of New Orleans, and an order of appeal is granted upon motion in the month of July following, the appellant is dispensed, under the Statute of 1843, from the necessity of having the appellee cited.

The statute of 1843, amendatory of the Code of Practice, is in these words: "The party intending to appeal may do so either by petitions, or by motion in open court, at the same term at which the judgment was rendered; in which last case the judge shall fix the amount of the security, and cause the same, with the order granting the appeal, to be entered upon the minutes of the court; and where an appeal has been granted on motion in open court, no citation of appeal, or other notice to appellee, shall be necessary."

In the case of *St. Avid v. Pychot* (3 An. 6,) it was held that the late First Judicial District Court of Louisiana, whose sittings, like those of the present

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District Courts of New Orleans, were held exclusively in New Orleans, had monthly terms, under the Statute of February 10th, 1813. They extended from and embraced respectively the months of November, December, January, February, March, April, May, June, and July. The fair inference from that opinion is, that, where an appeal was taken by motion in the month in which the judgment was rendered, such motion would fall under the Act of 1843, and would involve a dispensation of actual citation.

It is also a matter within the knowledge of the court, deduced from its own records, and of which it is proper for the court to take notice, that the practice was very frequent not only in the late district court, but also in the late commercial and parish courts of New Orleans, to take appeals by motion; and we are not aware that the right to do so during the month in which the judgment was rendered, and a consequent dispensation of actual citation, were ever questioned by the profession or by this court. It is also a fact familiar to the profession and to this court, that the late first judicial district court, the late parish court of New Orleans, and the late commercial court, for many years held their sessions continually during many months without adjournment.

When the adoption of the Constitution of 1845, imposed upon the Legislature the duty of organizing anew the courts of the State, we find this duty fulfilled with regard to New Orleans, by the Act of April 30, 1846 (Acts, p. 32), to which statute the counsel on both sides refer us. By this statute it was enacted that, there shall be five district courts in the parish and city of New Orleans, and that said courts shall be opened from the first week in November, to the fourth day of July; provided that for criminal and probate causes, and for granting interlocutory orders, they shall remain open all the year. Secs. 1 and 3. For the district courts in most of the other parishes, four *terms* respectively in each year are established, to commence on certain specified days; and with regard to those courts it is obvious that no difficulty could arise upon the point, what constitutes the *term*.

Under this organization of the district courts of New Orleans, it seems to have been generally assumed by the profession and by the judges of those courts, that the Act of 1843, was still in force with regard to those courts. This interpretation by the profession and by the district judges, is entitled to very great respect. *Contemporanea expositio est optima et fortissima in lege*. It commends itself also by considerations of convenience by a recollection of the evils which produced the Statutes of 1839 and 1843, and the liberal spirit of those enactments. If the Statute of 1843 has been virtually repealed by the legislation of 1846, so far as regards the courts of New Orleans, in which a very large portion of the litigation of this State is carried on, the inconvenience and evils which preceded and produced the Statute of 1843 will spring up anew, involving an increased expense to litigants and the frequent frustration or delay of justice. To such a conclusion this court ought not to come unless the recent legislation be so inconsistent with the Act of 1843 as to compel the deduction that the law-giver intended to deprive the New Orleans litigant of a cheap and convenient remedy, which undoubtedly is still open to litigants elsewhere.

The only difficulty in this matter arises from the question, what is the *term* of a district court in New Orleans, to which we are to apply the provision of the Statute of 1843? The Act of 1846 above cited does not designate the terms of the district courts of New Orleans *eo nomine*. If we should say that, for the purposes of appeal, we are to consider the prolonged session of those courts

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from the first week of November to the fourth day of July as one term, such an interpretation would involve practical results which certainly could not have been contemplated by the act of 1843. There was no hardship in the fiction of law involved in that statute, which considered a party as in court during a term which in the country parishes rarely was prolonged beyond two or three weeks, and in the district court of the first judicial district covered one month. But to consider a litigant as being constructively present in court after judgment, during a period of nine months, and bound day by day thereafter to watch the minutes of the court, and take notice of an order of appeal, would be extremely onerous, and a statute made to further justice, might become an instrument of injustice. Considering the evils which the statute of 1843 was intended to remedy, the unreasonableness of inferring from subsequent legislation any intention to deprive litigants at New Orleans of the benefit of that statute, the absence in the statute of 1846 of an express designation of a term *eo nomine*, and the inconsistency of any other interpretation than that which we now adopt, with the true spirit and intention of the act of 1843, we conclude that the intention of the law-giver will be fulfilled by considering the act of 1843 as still applying to the district courts of New Orleans; and this to the same extent and in like manner as the same was understood and practised, with the concurrence of the bench and bar, during the existence in New Orleans of the various courts to which under the new Constitution and the act of 1846, the present courts have succeeded. This practice we understand to have been, to consider the terms as monthly for the purposes of appeal under the act of 1843, although in point of fact the former courts, like the present, sat continuously from November to July.

As the month in which the judgment in question was rendered and signed, had expired before the motion for appeal was made, we are of opinion that it cannot be considered as being within the act of 1843, so as to dispense the necessity of citing the appellee. And as the absence of citation is attributable to the fault of the appellant, it follows that the appeal must be dismissed, which is now ordered accordingly; the costs of the appeal to be paid by the appellant.

FAVROT v. DELLE PIANE.

Where one who has obtained an attachment against a debtor, subsequently applies for a second attachment on the ground of the insufficiency of the property originally attached, he must show, under oath, the continued existence of the debt and the necessity for the further process asked for, or the application must be rejected.

One who has acquired a domicile in the State cannot escape a constructive personal citation, and the personal jurisdiction of the court of that domicile, but by the acquisition of a domicile in some other parish of the State, or by an actual removal from the State.

Where a court, from which an attachment had been issued, had acquired a personal jurisdiction of the defendant, it may, upon an affidavit showing the insufficiency of the property attached and the continued existence of the debt, issue a second attachment directed to the sheriff of another parish in which the defendant has property. *Per Cur*: Viewing the attachment as a conservatory measure incident to the main action, there seems no reason why the jurisdiction of the court, for the purposes of attachment, where the debtor is personally cited, should be confined within its territorial limits any more than in the case of a *fi. fa.* upon a judgment *in personam*, which may issue to any parish in the State. *Aliter*, Where the jurisdiction of the court, being exercised only *in rem*, vests solely upon

the property attached, in which case the power of the court is confined to its territorial limits. In such a case it acts upon the thing, and not upon the person of its owner. Its jurisdiction is derived from the seizure of the property, and its judgment has no vitality except against the thing thus subjected to its control.

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APPPLICATION for a Mandamus to *Burk*, Judge of the District Court of West Baton Rouge. *Elam* and *Morgan*, for the applicant. The judgment of the court was pronounced by

SLIDELL, J. The main question presented in this case is, whether the District Court in and for the parish of West Baton Rouge has jurisdiction to issue process of attachment, to attach the property of *Bernard Delle Piane*, in the parish of East Feliciana. It appears from the allegations of the petition and affidavit in the cause, and the petition of the applicant to this court, that *Delle Piane* was, at the date of the institution of the suit, domiciled in the parish of West Baton Rouge. It is however stated that he had abandoned the plantation which he had cultivated in that parish, and had removed from that parish; and that the plaintiff had just reason to fear that he would remove permanently out of the State. The affidavit annexed to the original petition declared that the allegations of the petition were true, and that the defendant was about to remove permanently from the State, and will so remove with his property unless detained by an order of attachment. Upon this showing the District Judge, sitting in the parish of West Baton Rouge, ordered, on the 5th October, 1849, that an attachment issue as prayed for, on giving bond, &c. In November following, the plaintiff presented a supplemental petition, in which, after referring to his previous petition and the process of attachment which he had obtained, he alleges that the property found in the parish was encumbered by previous liens and insufficient to satisfy his claim; that the defendant possessed other property in the parish of East Feliciana. It was therefore prayed that an order be granted for a writ of attachment, addressed to the sheriff of that parish. This petition was not accompanied by an affidavit.

The judge declined to grant the order, being of opinion that he was without jurisdiction. Therefore a petition, under oath, was presented to this court, applying for a mandamus to the district judge. In this petition the applicant declares that he has good reason to believe, and does believe, that *Delle Piane* is about leaving the State permanently; that the property already attached is insufficient to meet his claim; that his debtor has removed property to the parish of East Feliciana, where he owns and possesses it at this time; and that the district judge has refused to order the issuing of a writ of attachment to that parish.

We are of opinion that, aside from the question of jurisdiction, the district judge might have properly refused the order applied for; because there was no showing under oath of the continued existence of the debt, and the necessity of the further process demanded. This is a sufficient reason for refusing the mandamus. But as the district judge based his refusal upon the ground of a want of jurisdiction, and as a formal application would be refused upon the same ground, we have thought proper, in order to avoid a delay which might prejudice the plaintiff's interest and a renewal of the application to this court, to express our views in some degree upon the question of jurisdiction in cases of attachment, as applicable to what we understand to be the merits of the plaintiff's application. In doing so, we shall assume that West Baton Rouge was the legal domicile of the defendant at the institution of the suit. That it was until

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very recently his domicil is clear; and as no new domicil within the State had been acquired, under the plaintiff's allegations, as the permanent departure from the State was a matter resting in intention and consummated by an actual departure at the date of the institution of the suit, and as, under the well settled principles of jurisprudence and the textual provisions of our Code of Practice, a man's old domicil can only be changed by the adoption of a new one, *animo et facto*, we therefore may properly hold that the parish of West Baton Rouge was his domicil at the time of the institution of the suit, and consequently that the district court of that parish could acquire jurisdiction of the cause *ratione personæ*. The mere personal departure of the defendant from the parish did not prevent the service of a citation, for art. 253 of the Code of Practice declares that the sheriff must serve the citation, 1st, on the person of the defendant, or at his domicil, if he has one in the place, or if he be about to leave the State; 2, at the place where the defendant has resided last, if he had a domicil in the place and conceal himself to avoid being cited. It seems to be the clear intention of the law, so far as suits by attachment are concerned, that a man once domiciled in the State shall not escape a constructive personal citation and the personal jurisdiction of the court of that domicil, except by the acquisition of a domicil in some other parish of the state, or, by an actual removal from the State.

If then the District Court of the parish of West Baton Rouge has acquired a personal jurisdiction over the defendant, either by a personal service of citation upon him, or by a service of citation at his late residence, he, although absent from the parish, not having left the State nor acquired a domicil in any other parish of the State, then, in our opinion, the district court would have the right to issue process of attachment to the sheriff of East Feliciana upon affidavit showing the insufficiency of the property attached, the continued existence of the debt, &c. For such process, when the defendant is personally cited, is not, as observed by Martin. J. in *Williams v. Kimball*, 8 N. S. 354, a mode of bringing suit, but a conservatory act, a remedy or incident, which may precede or accompany the action. See also C. P. 208, 209.

Viewed in this light, as a conservatory measure incident to the main action, there seems no reason why the jurisdiction of the court for the purposes of attachment, where the debtor is personally cited, should be confined within its territorial limits, any more than in the case of a *feri facias* upon a judgment in *personam*, which undoubtedly may issue to any parish within the State.

There is a manifest distinction between the case supposed, of a court which has acquired personal jurisdiction, and that of a court whose jurisdiction being exercised only *in rem*, rests solely upon the property attached. In the latter case the power of a court seems to us to be limited to its territorial limits. It acts upon the thing, not upon the person of its owner. Its jurisdiction is described from the seizure of the property, and its judgment has no vitality except against the thing thus subjected to its control. If there be no property within its territorial limits and no personal citation, no jurisdiction vests, and its process and decree would be merely null. See *Jobson v. McRae*, 3 An. 301. *Brougham v. Ring*, 2 An. 571.

In expressing the opinion that a court which has jurisdiction *ratione personæ*, and has exercised it by citation, can extend the incidental remedy of attachment by issuing its process to the sheriff of another parish, we do not undertake to say in what mode the attachment thus levied may afterwards be enforced.

Difficulties may arise which it is not necessary now to solve, as in case of a garnishee declining to answer out of the parish of his domicil, &c. These difficulties, however, pertain rather to the exercise of the right than to the right itself. It is also obvious that where a corporal thing in the possession of the debtor is seized in another parish, there could be no greater inconvenience arising in case of an attachment than in that of a *fi. fa.* emanating from a court sitting in another territorial jurisdiction. We may add that the subject of garnishment, when the garnishee under *fi. fa.* lives in a different parish from that in which the court sits from which the process emanated, was noticed in the case of *Featherston v. Compton*, 3 An. 380.

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It not appearing that the district judge erred in rejecting the application, as made to him, for an order of attachment, it is therefore ordered that the petition for mandamus be dismissed at the costs of the applicant.

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1. Where a judgment has been obtained here against a debtor, who subsequently died, in another State, leaving residuary legatees, who received their share of his succession, the administration of which in this State had been closed, but who are absentees, plaintiffs cannot proceed against them by appointing a curator *ad hoc* to represent them, and by a rule on them to show cause why execution should not issue against them on the judgment against their testator. The recourse which plaintiffs undertake to exercise being personal and involving matters *en pais*, they must proceed by an action in the ordinary form. *Reynolds et al. v. Horn et al.*, 187.

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1. An award rendered by amicable compounders cannot be revised by the court for errors of judgment; it can only be attacked for fraud or usurpation of power on the part of the auditors.

2. An award of arbitrators, not binding on account of the want of authority from a married woman to her husband, who had agreed, in the name of the former, to an extension of the time for making the award, and in consequence of its not having been duly homologated, will be rendered valid by a subsequent execution of it by the parties. Its execution by the wife would cure the want of original authority in the husband, and the execution of the award by the parties would entitle them to its benefits, as fully as though it had been duly homologated. *Cobb et al. v. Parham et al.*, 148.

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I. Will lie When.

1. Where, after a third person had been made a party to an action in place of the original plaintiff and recognized as such, defendant excepts to his right to sue as plaintiff, praying that the action may be dismissed, and the exception is sustained and the motion to make him a party to the proceeding is refused, no appeal will lie from the judgment of refusal. *Per Curiam*: The judgment ought to have been in conformity with the conclusion of the exception that the suit be dismissed; and from such a judgment an appeal might have been sustained. *Walker v. Caldwell*, 12.

2. An appeal taken from a decision of a justice of the peace will be dismissed, where it is impossible to examine the ques-

tion as to the legality of a city ordinance imposing a penalty, without exceeding the jurisdiction of the court by deciding other matters presented in the case, of which it has no jurisdiction. The jurisdiction of the Supreme Court on appeals, involving the constitutionality or legality of fines, forfeitures and penalties, under \$300 in amount, imposed by municipal corporations, is confined to the question of the constitutionality or legality of such fines, forfeitures and penalties. Const. art. 63. *Penn v. First Municipality*, 13.

3. No appeal will lie from a judgment rendered by the mayor of a town, for a sum under three hundred dollars, for an alleged infraction of an ordinance of the corporation, where the only question raised is as to the constitutionality of an act of the legislature vesting judicial power in the officer who rendered the judgment. *Mayor, &c. of Donaldsonville v. Richard et al.*, 83.

4. An order by which a rule taken against a sheriff by the plaintiff in an action is made absolute, holding the sheriff to be personally liable to the plaintiff for any judgment that may be rendered therein, in the same manner as certain sureties, taken by him in a bond on which property was released, would have been liable, had they been found good and sufficient, is not a final judgment, nor one from which an appeal can be taken by the sheriff. *Crane v. McGrew*, 307.

5. Whatever may be the right of a party to appeal at once from a refusal to set aside a sequestration by which his property is actually detained in legal custody, it cannot be extended to the case of one who has been restored to possession by giving bond. It cannot be said that the judgment works, or may work, an irreparable injury, which is the test by which to determine whether an appeal will lie from an interlocutory judgment before a trial on the merits. *Wilson et al. v. Churchman*, 343.

6. No appeal will lie from a judgment overruling a motion to dissolve a sequestration, made by a defendant after he had bonded the property sequestered. Such a judgment is not final, nor does it work any irreparable injury.

7. No appeal will lie from an order refusing to set aside a sequestration, where the question of releasing the property is the only matter for consideration, and the record contains no information as to the value of the property, though the action was on a claim exceeding three hundred dollars. *Lemoine v. Garcia*, 366.

8. Where a defendant admits his liability for a part of a claim, and pays that portion into court, for which plaintiffs take judgment, reserving their right to the balance, which is less than the amount necessary to

authorize an appeal, the defendant cannot appeal from a judgment against him for the balance.

9. Whenever the constitutionality or legality of a tax imposed by a municipal corporation is in question, an appeal will lie without reference to the amount in dispute; but where the contest is as to the application and execution of an ordinance imposing such a tax, or the liability of an individual to pay it, the right to an appeal depends on the amount in dispute. *Second Municipality v. Corning et al.*, 407.

10. A suspensive appeal will not lie from an order discharging a prisoner under a *habeas corpus*, although the imprisonment grew out of proceedings in a civil action. [*King, J. and Slidell, J. dissenting.*] *Ex parte Emanuel et al.* 424.

11. Where an account presented by commissioners appointed to liquidate the affairs of a banking company, has been homologated so far as not opposed, the judgment of homologation will be conclusive against a creditor who made no opposition below. An appeal taken by a creditor under such circumstances cannot be entertained, without an assumption of original jurisdiction by the Supreme Court. *Matter of N. O. Improvement and Banking Co.*, 471.

II. Parties.

12. Were a plaintiff claims a fourth interest in a slave, and certain persons intervene in the action claiming the other three-fourths, she may appeal from a judgment dismissing the action without making the intervenors parties to the appeal. They might choose to submit to the decree, and she had a right to have her claim considered. *Gibson v. White et al.*, 14.

III. Bond and Surety.

13. The surety in a bond given for an appeal taken after the lapse of ten days from the notification of judgment, will be bound, in case the appellant be cast, only for costs, though the bond was for an amount large enough for a suspensive appeal, and the surety bound himself, in case the appellant should be cast and fail to satisfy the judgment, "to satisfy whatever judgment may be rendered against him." C. P. 578. *Per Curiam*: The bond must be construed with reference to the articles of the Code of Practice applicable to the subject matter.

14. The "costs" for which the surety on a bond given for a devolutive appeal is bound, are the costs both of the lower court and those of the appeal. *Byrne v. Riddell et al.*, 3.

15. On an appeal from a judgment in favor of two or more parties, a bond made payable to one of the appellees "*et al.*," will be good. The expression "*et al.*" must be considered as referring to all the other appellees, and the bond will be available to all of them.

16. Where one of two appellees has not been cited, the judgment cannot be touched, so far as he is concerned, but the omission is no obstacle to the consideration of the case as to the party cited, where the interests of the two are separate, and susceptible of being separately determined. *Bachus v. Moreau*, 313.

IV. Record

16. After a case has been submitted on the merits, it is too late for the appellee to contest the correctness of the certificate of the clerk that the transcript contains all the evidence offered on the trial. The objection cannot be considered after the implied acquiescence of the appellee in the correctness of the certificate. *Niblett v. Scott*, 245.

V. Motion to Dismiss.

17. A motion to dismiss, on the ground that the transcript was not filed in time, is not required to be made within three days after the filing of the record. *Dwight, Curator, v. McMillen*, 350.

18. A motion to dismiss an appeal, taken by the defendant from a judgment rendered in an action enjoining an execution, on the ground that the principal in the injunction bond was the only obligee in the appeal bond, must be made within three days after the record is filed. *Mitchell v. Lay*, 514.

19. *Per Cur*: Under the peculiar circumstances of the case of *Selby v. Gibson*, 3 An. 319, the motion to dismiss was properly sustained; but we are not satisfied with all the points which are there ruled, nor are they all indispensable to the decision of the motion. *Ludeling v. Frellsen*, 534.

20. Where an actual citation is necessary, and its omission is attributable to the fault of the appellant, the appellee, upon a motion seasonably made, has a right to require the dismissal of the appeal. *Cuddy, et al. v. Belleville Iron Works Company*, 582.

VI. Appeal generally.

21. A party intending to appeal, in a case in which the testimony was not taken

in writing, must require the adverse party, or his counsel, to draw jointly with him a statement of the facts proved in the case: and it is only after the refusal of the adversary to join in making the statement, or on the failure of the parties to agree as to the manner of drawing it up, that the judge can be called on for a statement, and this, though the party desiring to appeal was not present at the trial, either in person or by counsel. C. P. 602, 603. *Castaing v. Stone, et al.*, 18.

22. Where a suspensive appeal has been dismissed, on account of the failure to file the record, within three judicial days after the return day, the appellant cannot afterwards take a devolutive appeal from the same judgment. *Ducournau, et al., v. Levistones*, 30.

23. A decision of a court of the first instance on an incidental question, not presented by the pleadings, will not be examined on appeal, unless the evidence on which the court acted is stated in a bill of exceptions, or referred to as making a part of it. *Commissioners of Exchange Bank v. Yorke, et al.*, 138.

24. Where no answer has been filed by an appellee, an application to amend the judgment in his favor by allowing him higher damages on the dissolution of an injunction, will not be considered. *Cobb et ux. v. Hynes*, 150.

25. An appeal will be dismissed where the matter really in dispute is under three hundred dollars, though damages are claimed to a larger amount, where the claim for damages is evidently fictitious. Such a claim can give no jurisdiction to the court. *Vogel v. Relaud, et al.*, 213.

26. An appeal will not be dismissed on the ground of the record's not containing certain evidence adduced on the trial, where the defect was supplied, before the argument of the case, by an authentic copy of the document which was wanting, under an agreement in the court below that a copy should be furnished. The irregularity resulted from the plaintiff's consent, and it would be unjust to permit him to derive any advantage from a state of things he was instrumental in producing. *Herrick v. Connant*, p. 376.

27. Where in an action by a police jury, in which the tax-payers of the parish are the real parties in interest, the plaintiffs have not made out their case, but there is reason to believe they can do so if another trial be allowed, the case will be remanded for further proceedings. *Police Jury v. McDonogh*, 352.

28. The appeal must be dismissed, where the certificate of the clerk merely states, that, "the record contains all the papers on

file in the suit." C. P., 896. *Dwight, Curator, v. Allen, et al.*, 487.

29. A judgment will not be reversed on the ground of its not allowing interest, where the amount of interest was but small, and the omission was not made a special ground for a new trial. *Edelin v. Richardson*, 502.

30. Where an appeal is granted on motion in open court, no citation is necessary. *Mitchell v. Lay*, 514.

31. Where, in an action for money against a succession, the testimony of the witnesses is not reduced to writing and annexed to the record, and no list is made of such documents as were produced by the parties and not annexed to the record, the appellee may require the case to be remanded. *Pargoud v. Breard*, 517.

32. Where no petition and citation of appeal have been served on the appellee, it must appear from the record that the appeal was granted on motion in open court, or it must be dismissed. *Sears, Administratrix v. Willson, et al.*, 525.

33. The certificate of the clerk of a district court that, a transcript contains all the proceedings had, documents filed, and evidence adduced, on the trial of a case in which a judgment had been rendered by a court of probates, but in which an appeal was allowed by the district judge, after the court of probates had ceased to exist, where the clerk evidently had no other means of ascertaining the facts in relation to which he certifies, than by an inspection of the original record, in which neither the certificate of the probate judge nor of his clerk, that the record contains all the evidence, nor any list of the documents produced, are to be found, is insufficient, and the case must be remanded. C. P. 1042. *Polk v. Childers, Executrix*, 500.

34. It is not necessary that a petition of appeal should contain an express prayer that the appellee be cited, where there is but one antagonist party to be brought before the appellate court. *Per Cur*: We do not say that cases may not occur where it might be necessary to point out, to the ministerial officers, the respective persons whose citation the appellant may desire. Arts. 573, 581 must be construed with reference to the liberal spirit of the stat. of 20 March, 1839; and, in doing so, even if the point be doubtful, the appellant is entitled to the benefit of the doubt. *Ludeling v. Frellsen*, 534.

35. An appeal will not be dismissed, where the bond, though insufficient for a suspensive, is large enough for a devolutive, appeal. *Same case*, 534.

36. Decision in *Gardere v. Murray*, 5 Mart. N. S. 244, that, if a judgment be signed before the proper time, the party against whom it is rendered, may move for a new trial as though the judgment had not been signed, but if, instead of doing so, he appeals, that he will be thereby precluded from urging that the appeal was not final—affirmed.

37. An appellant, who had been allowed by the judgment appealed from but a dividend on his claim out of the funds for distribution, who contends that the judgment was rendered without evidence, in his absence, and by consent of the other parties, cannot require an amendment of the judgment so as to allow him the whole amount of his claim out of the fund for distribution, on the ground that the other parties, by allowing him a dividend on his claim, recognized its amount. *Per Cur*: The appellant has no right to divide the consent of the other litigants, which was intended by them to facilitate the disposition of the fund in court, and made in a spirit of compromise. *Fretz et al. v. Carlisle et al.*, 561.

38. Where one, who had opposed the homologation of a final tableau of distribution presented by an executor, on which a judgment was rendered, approving the payments made by the executor, and allowing all the claims against the succession, except one set up by the opponent, to whom the usufruct of the succession had been bequeathed, against the universal legatee, after the expiration of the usufruct, and ordering another account to be rendered settling the respective rights of the opponents and the universal legatee, appeals as against the universal legatee, from the judgment, without making the executor a party, the appeal must be dismissed. *Succession of Perry*, 577.

39. Where a judgment was rendered and signed by a district court, for the city of New Orleans, during the month of June, an order of appeal granted upon motion in open court, in the month of July following, will not under the Statute of 22d March, 1843, relieve the appellant from the necessity of citing the appellee; such citation being dispensed with only where the motion has been made within the same calendar month in which the judgment was signed. The Statute of 1843 is applicable to the present district courts of New Orleans, not having been repealed by the Statute of 30th April, 1846, organizing those tribunals. *Cuddy v. Belleville Iron Works Company*, 582.

ARBITRATORS.

See AMICABLE COMPOUNDERS.

ASSIGNMENT.

See SALE, TRANSFER OF DEBTS.

ATTACHMENT.

1. An attachment will not lie in an action for damages, *ex delicto*. *Holmes et al. v. Barclay et al.*, 63.

2. Where a creditor fraudulently obtains possession, in another State, of the property of his debtor, who resided there, and brings it clandestinely into this State, without the consent or knowledge of the debtor, and immediately attaches it, the attachment will be dissolved. The fraudulent act of the plaintiff cannot give jurisdiction to our courts. *Powell v. McKee*, 108.

3. Plaintiff, in an action commenced by attachment, will be entitled to a judgment by default, against an absconding debtor, where a copy of the citation and petition were left with the wife of the defendant at his residence. The appointment of a curator *ad hoc* is unnecessary in such a case. *Thomas v. Wetzler*, 184.

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5. An attachment will lie, in an action by the purchaser against the vendor, of a slave, alleged to have absconded from the plaintiff and to have returned to the vendor, who harbored him and refused to give him up, to recover the value of the slave, and of his services during his detention, and damages for expenses incurred on demanding him and for counsel fees. *Per Curiam*: The retention of the slave was a violation of the contract of sale; and the responsibility thereby incurred is not diminished or destroyed by an outrage, perhaps a crime, being added to it. *Crane v. Lewis, Sheriff*, 320.

6. Where, in a bond executed for the release of property attached, three persons are named as principals, but the bond is signed by but one of the principals and a surety, the latter will not be bound, in the absence of evidence to destroy the presumption that he expected the three persons named as principals to be bound as such, or to show that he would have any recourse against them, if he paid the amount. *Clements v. Cassilly et al.*, 380.

7. Where one who has obtained an attachment against a debtor, subsequently applies for a second attachment on the ground of the insufficiency of the property originally attached, he must show, under

oath, the continued existence of the debt and the necessity for the further process asked for, or the application must be rejected.

8. Where a court, from which an attachment had been issued, had acquired a personal jurisdiction of the defendant, it may, upon an affidavit showing the insufficiency of the property attached and the continued existence of the debt, issue a second attachment directed to the sheriff of another parish in which the defendant has property. *Per Cur*: Viewing the attachment as a conservatory measure incident to the main action, there seems no reason why the jurisdiction of the court, for the purposes of attachment, where the debtor is personally cited, should be confined within its territorial limits any more than in the case of a *fi. fa.* upon a judgment in *personam*, which may issue to any parish in the State. *Aliter*, Where the jurisdiction of the court, being exercised only *in rem*, vests solely upon the property attached, in which case the power of the court is confined to its territorial limits. In such a case it acts upon the thing, and not upon the person of its owner. Its jurisdiction is derived from the seizure of the property, and its judgment has no vitality except against the thing thus subjected to its control. *Favrot v. Delle Piane*, 584.

ATTORNEY AT LAW.

1. Article 2422 C. C. which prohibits attorneys from purchasing litigious rights which fall within the jurisdiction of the courts before which they practice, under the penalty of nullity, and the payment of all costs, damages and interest, is imperative; and the fact that the attorney had no connection with the litigation, and that the purchase appears to have been fair, cannot exempt the purchaser from the operation of that article. *Waterston v. Webb, Administrator*, 173.

2. An attorney at law should not be held to a less onerous responsibility than an attorney in fact; and he will be bound to pay interest on any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over. C. C. 2984.

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ATTORNEY IN FACT.

See MANDATE.

AUDITORS, EXPERTS.

A court has no authority to make any allowance as a fee to an expert, to be taxed among the costs of the suit. Const. art. 71. *Rathbone v. Neal*, 563.

AUTHENTICATION.

See EVIDENCE.

BAIL.

See CRIMINAL LAW.

BANKS.

1. An act of the legislature authorizing the reduction of the stock of a bank to the amount paid in at a certain period, accepted by the stock holders, will exonerate the latter from any liability beyond the amount of the reduced stock, as to creditors who have become so since the reduction.

2. The date of a bank note is no evidence, even against the bank, at the period at which it became the property of the holder; nor can a subsequent holder claim to be vested with the rights of the first holder, so as to consider the debt due to him as dating from the period of the original issue. *Hepburn et al. v. Commissioners of Exchange Bank et al.*, 87.

3. Where certain shares of the stock of a bank were attached, and, on a judgment rendered in favor of the plaintiff in attachment, were sold under execution, an intervenor in the attachment suit, who claimed the stock, and was subsequently adjudged to be the owner of it by a superior tribunal, on a writ of error sued out by him, but which did not suspend execution, cannot recover against the bank, the value of the stock, with profits, dividends, &c., for permitting the marshal to transfer the stock to the purchaser of the judicial sale, and for refusing to transfer the shares to him on the ground of their sale and transfer to the purchasers at the marshal's sale; nor will the fact that the stock was sold without appraisal, at a time when an appraisal was not considered necessary, though subsequently adjudged to be so, subject them to liability, there having been no neglect on their part, and they being justified in be-

lieving that the public officer acted according to his duty. *Chapman, Assignee v. The New Orleans Gas Light Company et al.*, 153.

4. Under the Statutes of 14th and 26th March, 1842, and 5th April, 1843, providing for the liquidation of banking companies, a debtor to a bank was entitled to give in payment the obligations of the bank, without reference to the date at which he acquired them. *Saunders et al., Commissioners, &c. v. Smith, Administratrix*, 232.

5. The board of directors of the branch of the Union Bank at Covington, being clothed by the Statute of 2d April, 1832, incorporating the bank, and by the rules and regulations adopted by the board of directors of the mother bank, with such powers only as the charter expressly granted, or such as were necessary and incidental to the accomplishment of the objects contemplated by the charter, in establishing an office of discount and deposit at that place, were limited agents, unauthorized to make a donation of the property of the stockholders; consequently, where the maker of a note owned by the bank made a *cessio bonorum*, the board of directors of the branch could not authorize the cashier to vote for his discharge, thereby abandoning all claim against the insolvent in the event of his coming to better fortune, and discharging the endorser. The bank having acquired a right to a dividend whether a discharge was voted or not, the vote was purely gratuitous—a mere donation, and not binding on the bank. *Union Bank of Louisiana v. Jones*, 236.

6. The decision in *Bertoli v. Citizens' Bank*, 1 An. 119, that no sale, whether judicial, forced or voluntary, of property mortgaged to the Citizens' Bank, can in any manner affect the rights secured to that institution by the 24th section of its charter, applies to the case of a sale made without the consent of the bank and for a sum insufficient to satisfy their claim. *Alling v. Citizens' Bank et al.*, 308.

7. Stockholders of a Bank, appointed commissioners of an election for directors, who have given a certificate of election in favor of certain individuals, will not be allowed to urge, in an action to annul the election, that the votes were illegal, unless they allege they were received through error. Nor will such stockholders be allowed to become relators in a *quo warranto*. *Wiltz et al. v. Peters et al.*, 339.

8. The proviso in the Statute of 27th March, 1843, amending article 3333 C. C., which declares that that act shall not apply to certain mortgages in favor of the property banks, is not restricted to stock mortgages executed in favor of those banks, nor to

those made directly to them, but extends to mortgages which have been acquired by subrogation; and where the subrogation was by authentic act, and recorded where similar contracts are required to be recorded, third persons will be affected by notice without any inscription in the books of the recorder of mortgages. [*On this point, the court being equally divided, the judgment below was affirmed.*]

9. The Statute of 27 March, 1843, was intended to enlarge the effect of the Statute of 11 March, 1842, amending art. 3333 C. C. It does not follow because these Statutes are exceptional, that they should be construed strictly. The construction should be such as will advance the object of the legislature. [*On this point, the court being equally divided, the judgment below was affirmed.*]

10. Section 19 of the Statute of 9th February, 1836, incorporating the New Orleans Improvement and Banking Company, does not exempt from taxation real estate held by the Company. The exemption extends only to its capital stock.

11. The penalty imposed by section 9 of the Statute of 9th February, 1836, incorporating the New Orleans Improvement and Banking Company, which declares that if the said company shall, at any time, suspend or refuse payment in lawful money of the United States of any of its notes, bills, or obligations, the holder of any such note, bill, or obligation, or person entitled to demand and receive such money, shall be entitled to receive interest thereon from the time of such suspension or refusal, until fully paid, at the rate of twelve per cent a year, cannot be recovered without a demand of payment of each note, and proof of failure to pay, and then only from the date of such demand and failure. The suspension of specie payments by the bank, will not relieve the holder from the necessity of making such a demand, to entitle him to interest at that rate.

12. Where an account presented by commissioners appointed to liquidate the affairs of a banking company, has been homologated so far as not opposed, the judgment of homologation will be conclusive against a creditor who made no opposition below. An appeal taken by a creditor under such circumstances cannot be entertained, without an assumption of original jurisdiction by the Supreme Court. *Matters of the New Orleans Improvement and Banking Company*, 471.

BANKRUPT.

1. The act of Congress of 19 August, 1841, establishing an uniform system of

bankruptcy, does not require that an appellant should file, after the decree declaring him a bankrupt, a separate petition for a discharge, under the penalty of nullity of the subsequent action of the court, as against creditors. A prayer for a discharge, in the original petition of the bankrupt, is sufficient. Sec. 4.

2. A plea that defendant had been discharged from his debts, under the Statute of 1841, as a bankrupt, will not be affected by the fact that no order appears in the transcript from the bankrupt court, designating the time and place at which the creditors were required to appear, nor the newspapers in which the publication of notice was to be made. *Per Curiam*: The act requires that the newspapers shall be designated by the court, but not that the designation shall be made by a formal order of record in the case. It might have been made by a general order applicable to all bankrupt notices.

3. Where the judgment of a court, sitting in bankruptcy, declares that the notices required by the Statute of 1841 were published in proper form, such publication must be assumed to be true, by another court called upon to question collaterally the validity of the decree.

4. Section 4 of the Statute of 19 August, 1841, which gives the right of personal notice to a creditor whose residence is known, does not require a formal judicial process, and a return of service by the marshal; the service might have been by letter. The mode of service was a matter to be prescribed by the court, in its discretion.

5. Though a transcript of the proceedings under the bankrupt act of 1841, offered in evidence by one who sets up her discharge under the Statute in defence to an action, does not show personal service on a creditor entitled to it under the act, the decree discharging him will not be declared null on that account.

6. A promise to pay a debt, from which the party had been discharged as a bankrupt, must be express, distinct, and unequivocal. The intention of the bankrupt to bind himself, must be clear. *Linton et al., v. Stanton*, 401.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Title to, and Transfer.

1. The transfer of the title to a promissory note is not restricted to the form of an endorsement. It may be assigned by a separate instrument; and the assignee may sue in his own name.

2. Where a note described in a notarial act of assignment corresponds in date, amount, parties, rate of interest, maturity, and in all other respects with the note sued on, with the single exception that the note described in the notarial act is stated therein, to be secured by mortgage while the note held by plaintiff is not *paraphed*, the want of a paraph will not be considered inconsistent with the identity of the notes. *Jones v. Elliott*, 303.

3. In an action, by the payees, on a bill endorsed by themselves, and afterwards by a third person, in blank, it is unnecessary to state such endorsements in the petition, or, in the absence of any evidence to impugn the title of the plaintiffs, to prove them on the trial. *Thierry v. Laffon*, 347.

II. Presentment of Protest, Notice, and Waiver of Notice.

4. Where the death of an endorser is known, notice of protest, put into the post-office, addressed to the deceased, is insufficient; the notice should have been addressed to his executor. But, if the notice reached, or came to the knowledge of the executor, notwithstanding its defective address, the succession would not be discharged. So a notice, under such circumstances, addressed to the deceased, if served on the executor, at his dwelling, is sufficient.

5. Under the Statute of 13th March, 1827, s. 1, the certificate of a notary that, a written notice of protest was served at the domicile of the endorser, in a village named in the certificate, is sufficient, though it do not state the person on whom the service was made. *Louisiana State Bank v. Dumartrait et al.*, 483.

6. Where the endorser of a bill payable in this State is not shown to have had, when the bill was presented for acceptance and payment, a permanent residence here, but to have been doing business here during the winter and returning to the north in the summer, a notice of protest addressed to him at the north, during his absence from the State, to the care of a person, to whose care a witness testified that the endorser had requested him to direct his letters, accompanied by proof that he had received a private letter directed to the same address, informing him of the protest, will be sufficient. *McKenzie et al. v. Ward*, 572.

III. Damages on Bills.

7. The payee of a bill of exchange drawn abroad, payable and protested here, cannot recover damages against the acceptor. *Thierry v. Laffon*, 347.

IV. The Consideration.

8. Where, by the terms of a building contract, the price is payable in seven instalments, and the proprietor accepts an order drawn upon him by the undertaker in these words: "accepted, payable according to agreement with the builder, on the last payment I have to make to him according to contract," and the undertaker after receiving the first instalment, and a second payment in advance, abandons the work, the person in whose favor the order was made cannot recover its amount from the proprietor, who had nothing more to pay to the undertaker. *Saloy v. Pepin*, 573.

V. Evidence.

9. Parol evidence is admissible to prove the period at which a bill was intended to be payable, which was drawn payable "———months after date," and discounted by a bank without filling up the blank. The testimony does not contradict the instrument, but supplies an omission, which, on the face of the contract, was either an oversight of the parties, or an intentional submission of the term to the discretion of the bank.

10. The cashier is a competent witness for the bank by which he is employed. *Union Bank v. Mceker*, 189.

11. In an action on a bill of exchange payable "in current city notes," which plaintiffs aver were, at maturity of the bill, and still are, at *par* and equivalent to specie, where no proof is offered on either side as to their value at maturity or at the time of the trial, judgment must be rendered for the amount payable according to the tenor of the bill, though the notes were below *par* at the maturity of the bill, but at *par* at the time of the trial. It was incumbent on defendants, and not on plaintiffs, to prove the value of the notes at the maturity of the bill, and at the time of the trial. *Wilson et al. v. Lambeth et al.*, 351.

12. Parol evidence is admissible to prove the consideration of a due bill, silent as to the consideration. The evidence cannot be considered as contradicting the terms of the written instrument. *Klein v. Dinkgrave*, 540.

VI. Of Bills of Exchange and Promissory Notes generally.

13. The mere joint ownership of real estate confers no authority upon either of the joint owners to bind the other by a note.

14. To enable one of the members of a partnership formed for the cultivation of land held by them as joint owners, to bind the other by a note made in the partnership name, an express authorization, or one clearly to be implied from the course of business of the firm, is necessary. In the absence of such express or implied authority it is incumbent on the payee to prove that the amount of the note inured to the benefit of the partnership. *Benton v. Roberts et al.*, 216.

15. Notes payable to the order of minors, not being transferable by endorsement or delivery so long as the minority lasts, are not subject to the prescription of five years. *Bird v. Pate, Administrator*, 225.

16. Where the maker of a note was, before its execution and until his death, a resident of this State, and his succession was opened, and all of his available property situated here, the fact that the note was dated and payable in another State, will not, in an action on the note against his succession here, make the case an exception to the general rule that the *lex fori* governs prescription.

17. A note made payable to certain commissioners, and not to them or their order, though it contains the words "payable and negotiable at the bank of M * * *, at N," is not a negotiable instrument, and, consequently, not prescribed by five years under art. 3505 C. C. *Per Curiam*: The words *negotiable at &c.*, being joined to the word *payable*, must be considered as referring to the place of payment, and perhaps to the currency usual there.

18. To ascertain whether an instrument is prescribed by our laws, its character must be determined with reference to our own jurisprudence. *Young, State Commissioner, &c. v. Crossgrove, Administrator*, 233.

19. Minors will not be bound by a promissory note signed by their tutor in his official capacity, in the absence of proof of judicial authority to make the note, or that its consideration inured to their benefit. *Succession of Johnson*, 253.

20. One, not a party to a promissory note, who puts his name on the back, will be bound as a surety.

21. Where two persons, not parties to a promissory note, write their names on its back, being bound as sureties, judgment will be rendered against them, *in solido*, for the whole debt. The obligation of each surety is to pay the whole debt; but this obligation is subject to the right to claim a division. Until this right is exercised, the obligation is *in solido*. C. C. 3018, 3019. *McCausland v. Lyons et al.*, 273.

22. One who purchases a bill of exchange from an agent, duly authorized to

draw upon his principal, on shipment to the latter of produce purchased for him, has nothing to do with the limitations fixed by the principal as to the price of the produce, unless proved to have been aware of them.

23. Where an agent is authorized to ship to his principal, and to draw on him, "with bill of lading attached," it is unimportant that the bill of lading be not *materially* attached or fastened to the bill of exchange. It is sufficient that the bill of exchange be drawn on the shipment, and that the bill of lading be delivered with it to the purchaser of the bill. *Forman et al. v. Walker*, 409.

24. Where a party binds himself to the holder of a note to pay the amount in case he cannot get it out of the maker, the return of the sheriff on a *fi. fa.* against the maker, "that having made diligent search and enquiry, and no property having been found in this parish, it is returned *nulla bona*," will not suffice to authorize a judgment against the surety. *Per Curiam*: The law makes it the duty of the sheriff to call upon the defendant to point out property, and, in case he is unsuccessful, to call upon the plaintiff to do the same thing. Here no such request was made from either, and, *non constat*, that the judgment would not have been paid if a demand had been made of the defendant. *Copley v. Richardson*, 512.

25. A payment on account made by the maker of a promissory note to a person not in possession of the note, nor authorized by the owner of the note to receive payment, and which was never received by the owner, will not entitle the maker to a credit for its amount.

26. Where the title of a holder, before maturity, of a negotiable note, is not affected by any reasonable suspicion, a mere partial failure of consideration between the original parties is not sufficient to throw upon him the burden of showing for what value he became the holder. *Tew v. Labiche et al.* 526.

BOUNDARY.

See LAND.

BUILDER.

See LETTING AND HIRING OF LABOR, &c.

CESSIO BONORUM.

See INSOLVENCY.

CITATION.

See PRACTICE.

CODES, ARTICLES OF, CITED.

I. Civil Code.

ART.	PAGE.	ART.	PAGE.	ART.	PAGE.
25	538	1928	79	2613	356
190	365	1934	206	2615	65
221	305	1960	145	2622	104
230	"	1965	329	2675	144
332	123	"	365	2696	40
335	520	1967	135	2700	"
356	488	1971	"	2743	97
367	375	1982	65	2744	"
454	126	1987	307	2746	"
456	"	1989	36	2807	216
457	"	"	65	2836	330
459	"	"	329	2974	413
517	193	2188	509	2984	"
518	"	2203	157	"	490
524	"	2291	144	3018	273
573	534	2294	79	3019	"
578	389	"	144	3048	42
579	"	2304	79	3204	9
581	534	2367	465	3239	97
827	33	"	569	3257	65
829	"	2380	"	3280	465
858	73	2387	328	3298	227
1035	25	2402	513	3314	"
1037	"	2417	262	3333	471
"	558	2421	65	3347	303
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1111	25	2428	293	3384	193
1176	334	2455	400	3387	"
1272	8	2493	128	3411	172
1289	"	2494	"	3505	126
1290	"	2508	51	"	171
1520	36	"	96	3508	136
1733	337	2518	430	"	169
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II. Code of Practice.

ART.	PAGE.	ART.	PAGE.	ART.	PAGE.
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166	"	394	"	"	307
175	296	391	206	719	36
189	363	543	106	896	487
275	184	544	"	924	415
279	372	561	401	"	517
280	"	"	544	970	25
295	144	578	3	1018	123
325	52	602	18	1042	500
375	136	603	18		

COMMERCIAL AND COMMON
LAW.

See LAW.

COMMON CARRIER.

1. Advances made to the captain and owners of a steamer in the home port, confer no privilege on the party by whom the advances are made unless he be subrogated to the privileges on the claims which were paid by the advance. *Hyde et al. v. Culver et al.* 9.

2. Where the master of a steamer, by false representations, induces an agent of a third person to ship merchandize on his boat at a certain freight, and the bill of lading states that the merchandize is taken "with the privilege of re-shipping," and the freight is re-shipped on another boat, and brought to the port of destination, the owner of the merchandize cannot require its delivery before paying the freight due to the boat on which it was so re-shipped, the contract by the master of the second boat having been made in good faith, at a reasonable rate, with a party who held a possession apparently fair, under a bill of lading authorizing a re-shipment. The bad faith of the master of the first boat should not deprive the owners of the second boat of the remuneration due for their labor.

3. Where an agent with whom merchandize had been deposited, disobeys the private instructions of his principal, by shipping it contrary to the orders of the latter, a third person who acted in good faith and in confidence in a contract made as to the merchandize, and possession transferred by the agent, will not be permitted to suffer.

4. Where a bill of lading stipulates for the privilege of re-shipment, a second carrier to whom the merchandize is transferred, will have a lien on the property for his freight. He is not the mere agent of the first carrier. *Walker v. Cassaway*, 19.

5. The liability of the owners of any ship, vessel, or other water craft to the owner of any slave illegally carried from one part of the State to another, under the Statute of 26 March. 1835, only exists where the master of the vessel would be subject to the pains and penalties of the Statute of 13 February, 1816.

6. The duty, imposed by the Statute of 13 February, 1816, on the master of a vessel who discovers a fugitive slave on board, to land him at the nearest place, is substantially obeyed by landing him at the nearest place where he can be landed with reasonable facility, and in such a mode as may be best calculated to ensure his safe keeping. It would be unreasonable to require a captain to stop in the night, and to go on shore in search for a justice or other inhabitant, when, by proceeding on his voyage till daylight he could reach a principal

town of the State, where he might provide for the safety of the slave, and give publicity to his elopement. *Botts v. Cochrane*, 35.

7. Where the consignees of a vessel, who had had other transactions with the owner, make advances to the captain, for services and supplies furnished to the vessel, for towage, pilotage, custom-house charges, and furnish him with cash for other purposes not shown, and, though informed by the owner of his intention to sell the vessel, take a bill of exchange on him, drawn by the master at thirty days, for the amount, and permit the vessel to depart, they must be considered as having made the advances solely on the personal credit of the owner, and cannot claim any lien, or tacit hypothecation, for the amount advanced, on the vessel in the hands of the vendee of one who had purchased the vessel while on her voyage to the port to which she was consigned.

8. To authorize the master to hypothecate a vessel by bottomry, it must appear that the advances were made for repairs, or supplies, necessary for the voyage or the safety of the vessel, and that the repairs or supplies could not have been procured on reasonable terms, nor with funds in the master's control, nor upon the credit of the owner independent of the hypothecation. It is essential to the lawful exercise of this power that, no other means of procuring funds, at the place at which they were required, existed.

9. The taking of a bill of exchange upon the owner of a vessel for advances made to the master, or for amounts due to material-men, or wages to seamen, is presumptive evidence that the credit is personal to the owner, and that any lien on the vessel is waived. *Harned v. Churchman et al.*, 310.

10. Though, in a contest between two joint owners of a steamer as to the extent of their respective interests, the enrollment, which states merely that the two are sole owners, will raise a presumption, under art. 2836 C. C., that the joint ownership was equal, it may be rebutted by the production of the books and papers of the steamer, which, under the circumstances, are equivalent to a written title in favor of the defendant; and parol evidence of their contents, unless specially objected to as secondary, must receive the same consideration as the books and papers themselves.

11. A part owner of a steamer or vessel, who owns more than half of the vessel, and is in possession, has an undoubted right to employ her in her usual trade, where no objection is made by his co-proprietor. It is only where the owners disagree, that

there is any conflict in the jurisprudence of maritime nations on this subject. Nor will this right of employment cease by the death of the co-proprietor, his rights and obligations being transmitted to his heirs.

12. Where one of the part owners of a steamer, in the exercise of his legal rights, continues the steamer in her usual trade, after the death of his co-proprietor, without objection on the part of the heirs or representatives of the deceased, any loss resulting from an explosion of her boilers must be borne by the co-proprietors in proportion to their respective interests, unless it be shown to have resulted from the negligence or misconduct of the surviving part owner. And where, in such a case, the share of the survivor is purchased by a third person after the explosion, who causes the repairs necessary to render the boat fit for navigation to be made in a prudent manner and in good faith, without objection on the part of the heirs or representatives of the deceased, and the repairs are proved to have increased the value of the boat more than their cost, the share of the deceased must, as between the succession itself, and the purchaser, be charged with its proportional part of the costs of the repairs. *Jouanneau, Curator, v. Shannon*, 330.

13. A consignee, not a *bond fide* purchaser, and who has made no advances on the shipment, but is the mere agent of a consignor who had attempted to defraud his vendor of the price of the merchandize, has no greater rights than the vendee, and cannot defeat the vendor's privilege, where the vendee could not.

14. Where, after the shipment of merchandize and the delivery of bills of lading to the shipper, the merchandize is sequestered at the suit of the vendor claiming a privilege for the price, and the master of the ship gives the consignee prompt notice of the sequestration, and, in the mean time, takes such steps in the case as will arrest the action of the court until the consignee can assert his rights, the master will be excused for not delivering the merchandize, and may recover from the plaintiff in the sequestration an indemnity for his trouble and loss in unloading the goods, &c. But where the master, as agent of the ship-owners, bonds the property, after having been notified by the sequestration that the vendor had been defrauded, it will be his duty, on arriving at his port of destination, to inquire into the circumstances of the consignee's title; and if he has any doubt as to it, to protect himself by a bill calling upon the vendor, the consignor and consignee, to litigate their rights among themselves; or, to refuse to deliver the property, if satisfied that the consignee was a mere

agent, and not a consignee for value. Where the master, in such a case, after bonding the property, offers no proof that he has delivered the merchandize, nor that it is not still in his possession, he will be responsible for its value; and where the sequestration is set aside for irregularity, and no recourse can be had upon the bond, a personal judgment will be rendered against him for that value.

15. Though a bill of lading be a negotiable instrument, and import a title to the shipment in the holder, excusing him, as a general rule, from the necessity of proving that he has given any value for it, yet such proof is necessary where evidence has been offered to establish the want, or failure, or illegality of the consideration, or that the bill had been lost or stolen before it came into the possession of the holder. In this respect the exercise of the vendor's privilege under our code is similar to the common law right of stoppage *in transitu*, which can be defeated by the negotiation of the bill of lading only where the transferee has received it in good faith and for value. *Wilson et al. v. Churchman*, 452.

16. Where a vessel, in consequence of unseaworthiness existing at the commencement of the voyage, and not from any perils of the sea or accident, is compelled to put into an intermediate port for repairs, where she is kept a much longer time than necessary to prepare her for the completion of her voyage, the owners will be responsible to the freighters for any damage resulting from the delay in the delivery of freight, occasioned by her unseaworthiness and unnecessary detention.

17. Where a vessel is compelled to put into an intermediate port for repairs, it is the duty of the master to cause the repairs to be made without any unnecessary delay, in order to prosecute his voyage to the port of destination. If he wait for orders from the owners of the vessel, the latter will be responsible to the freighters for any damage resulting from the delay.

18. Whatever care and diligence may have been shown in preparing a vessel for her voyage, and in rendering her staunch and strong, yet if, in fact, she was not so, the owners will be responsible for any damage resulting therefrom to the owners of freight, when not shown to have been caused by stress of weather or accident.

19. Where a vessel is compelled to put into an intermediate port for repairs, the burden of proving seaworthiness at the commencement of the voyage is on the owners of the vessel.

20. The value of merchandize at the port of destination is the basis of valuation in contracts of affreightment.

21. A carrier is bound not only to transport goods entrusted to him safely, but to do so within a reasonable time; and he is bound to account for their value such as it may be at the expiration of that time. Neither the acceptance of the goods, nor the subsequent disposal of them, by private sale, by the owner, will be a bar to the action. The ascertaining of the damage sustained by the owner, is a matter resting on the ordinary rules of evidence. *Rathbone et al. v. Neal et al.*, 563.

COMMUNITY.

See HUSBAND AND WIFE.

COMPENSATION.

1. Though a defendant have omitted to plead in compensation in an action against him a debt due to him by plaintiff, he may, on the ground that compensation takes place by mere operation of law, oppose the compensation to any attempt to execute the judgment; and this, though at the time of instituting the suit against him, or of executing it, the claim offered in compensation would otherwise be prescribed, provided that the prescription had not been completed at the time when the debt due by him was payable. *Riddell v. Gormley*, 140.

2. Where after a judgment has been rendered, but before it is signed, defendant purchases a judgment rendered against plaintiff for a larger amount, and takes a rule on the latter to show cause why a new trial should not be granted, and why, in case of its refusal, the judgment should not be declared to be extinguished, the rule should be made absolute, and the judgment declared to be extinguished by compensation. C. C. 2203. *Per Curiam*: Plaintiff would have been entitled to an injunction, and no reason has been suggested why affect should not be given to the plea of compensation on the trial of the rule, when the parties were before the court with their evidence. *Pattison et al. v. Edmonston et al.*, 157.

3. An amount due to a commissioner, appointed to liquidate a bank under the Statute of 14 March, 1842, for arrears of salary, will be extinguished by compensation, where the bank was a judgment creditor of the commissioner for an equal amount. *Conrey v. Copland*, 307.

COMPROMISE.

1. A transaction entered into on documents which are subsequently discovered to be false, is null *in toto*. In such a case it

is immaterial to enquire to what extent those false documents may have been the moving or determining cause of the transaction. *C. C. 3048. The Citizens' Bank v. Denistoun et al.*, 44.

CONFLICT OF LAWS.

1. An action will lie in this State for damages done to the property of the plaintiff by a steamer in another State, though by the laws of the latter the action would be held to be local. Such an action under our laws, is a personal action. *Holmes et al. v. Barclay et al.*, 63.

2. In an action in this State for damages for an offence or quasi-offence committed in another State, by the laws of which a jury might have allowed interest on the amount of damages assessed, the plaintiffs may recover interest from judicial demand on the estimation of the damage, where such interest is allowed as a part of the damages. *Same case*. 64.

3. The law of the place where the parties intend, at the time of their marriage, to fix their domicile, when there is no marriage contract or one without any provision in this respect, and when that intention is unequivocally ascertained, and supported by a subsequent removal to the place contemplated, governs the rights resulting from the marriage.

4. Where a marriage is contracted in a State in which the husband was domiciled at the time, and there was no change of domicile, nor any absolute and clear intention to change it, before the receipt by the husband of the property of the wife, the law of the place of the marriage must control the rights of the wife.

5. By the laws of Virginia and Mississippi, money and bank stock bequeathed to a woman subject to the condition of being returned to the estate of the testator, in case of her dying without issue, living at her death, will become the property of her husband by her marriage and the reduction of it into possession by the husband. His obligation to return the amount to the estate of the testator in case of the wife's death without issue living at the time, cannot prevent his acquiring the ownership of her interest, which is personality.

6. Where money and bank stock were bequeathed by one who resided and died in the State of Virginia, on the condition of its being returned to his estate in case of the death of the legatee without issue living at the time of her death, and the legatee removes to this State and dies here without issue bequeathing the whole of the property to a third person, the bequest made in Virginia, being valid by the laws of that State,

it would be to strain the policy of our laws to an unreasonable extent to refuse to enforce it here, in a contest between the executors of the first testator and the legatee under the will made in this State. *Hayden v. Nutt et ux.*, 65.

7. Deeds of trust executed in the Common Law States are regarded by the law of Louisiana, not as sales, but as mortgages. *Tillman, Trustee, &c. v. Drake*, 16.

8. Where a deed was executed in another State, by which certain slaves were conveyed in trust to secure the payment of a note payable to the creditor or bearer, the slaves remaining in the possession of the debtor, the trustee cannot, in case of the removal of the slaves to this State, enforce the execution of the trust, nor take possession of the slaves, without proof of the debtor's being in default by the non-payment of the note. Without such proof the trustee would be responsible for any loss sustained by the debtor from a seizure of the slaves. *Per Curiam*: We must not be understood as recognizing the right of trustees to execute trusts created on slaves actually within this State, without the intervention of judicial proceedings. *Gaulden v. McPhaul*, 79.

9. What constitutes title and what seizin, or, in the language of our law, the possession as owner of immovable property, must be determined by the law of the place where it is situated, and that is the only law which can determine whether a covenant of title and seizin has been broken or not.

10. A covenant of warranty, in an act of sale executed here, of land in another State, is a contract to be performed in that State, and what amounts to a fulfillment or breach of it must be determined by its laws. *Kling v. Sejour et ux.*, 128.

11. Prescription is governed by *lex fori*. *Young, State Commissioner, &c. v. Crossgrove, Administrator*, 233; and *Brown v. Stone*, 235.

12. An action on a promissory note, commenced by attachment against a non-resident maker, by whom the note was executed in the State of A., where he resided, payable in the State of M., cannot be maintained here after the time required to prescribe the note by our laws, on the ground of the claim not having been prescribed by the laws of M. *Per Curiam*: The maker having lived in A. at the time he became a party to the note, plaintiff could not have contemplated his bringing or keeping himself within the jurisdiction of M., and he cannot be considered as having done any act by which his creditor has been prevented from collecting his debt. *Brown v. Stone*, 235.

13. A marriage settlement, executed in another State, where the property was situated and where the parties resided at the time, if valid by its laws, cannot be affected by the subsequent removal of the parties to this State. *Young et al. v. Templeton et al.*, 254.

CONSTITUTION.

I. Of State, 1812.

Art. 4, s. 12, . . . page 248

II. Of State, 1845.

Art. 63, page 13, 83

" 70, " 248

" 71, 563

" 107, 182, 344

CONSIGNEE.

See MANDATE.

CONTINUANCE.

See PRACTICE.

CONTRACTS.

See OBLIGATIONS.

CORPORATIONS.

1. An assessment by a city corporation to contribute to the expense of paving, is not a tax. *City of Lafayette v. The Male Orphan Asylum*, 1.

2. The powers vested in police juries and other political corporations must be exercised by ordinances general in their operation. *De Ben v. Gerard*, 30.

3. The power to relieve the indigent sick, especially in time of epidemic disease, and to provide for the poor who are unable to labor, is inherent in every municipal corporation. *Vionet v. The First Municipality*, 42.

4. Where judgment is rendered in favor of a municipal corporation in an action for the removal of buildings alleged to be on land reserved by law for public road, if the jury find that they are in a public place, and do not come under the provisions of art. 858 C. C., no damages can be allowed to the proprietor.

5. No silence or length of time can deprive a corporation of its power over public places. Its inaction may give an estate by sufferances, but nothing more.

6. A question as to the breadth of land which a municipal corporation has a right to require for the construction of a road and levee is, within certain limits, an administrative question, to be left to the discretion of the local authority. *Mayor, &c. of Thibodeaux v. Maggioli*, 73.

7. Though it be conceded that an incorporated company, not empowered by its charter to declare the forfeiture of the shares of stockholders who may be in default by the non-payment of instalments due for the price of stock, cannot enact, through its board of directors, a by-law subjecting them to such a forfeiture, yet where, after the organization of such a company, a by-law is adopted at a meeting of the stockholders, declaring that the failure to pay any installment due for stock shall operate a forfeiture, in favor of the company, of the shares on which such installments may be due and of all previous payments thereon, and the evidence shows that the by-law received the general acquiescence of the stockholders, a stockholder, whose stock had been declared forfeited under the by-law, and who, though not at the meeting at which the by-law was adopted, is shown to have assented to it, and whose certificates of stock, signed by the president and secretary, and offered in evidence by himself, acknowledging the payment of the first installment, contain, at the bottom of each, a printed copy of the by-law, will not be allowed to recover from the company, on the winding up of its business, the amount paid on his stock. *Per Curiam*: The acceptance of the certificates in the form in which they were delivered, was a tacit acquiescence in, and submission to, the by-law; and it became the law between the party by whom it was accepted and his fellow stockholders. No rule of law forbids the stockholders to form such a convention with each other; it is not forbidden by the terms of the charter, and cannot be held to be against public policy; and, although the silence of the charter is a strong argument against the implication of such a power as an incident to the administration of the corporation, it is no reason for frustrating the wishes and agreement of the stockholders themselves. Regarding the question as one of contract, the stockholder whose shares have been forfeited, has no equitable claim for relief. *Lesseps et ux. v. Architects' Co. of New Orleans*, 316.

8. Where the right of parties who represent a corporation is not contested in the court below, it cannot be examined on ap-

peal. *Player v. Tarkington, Sheriff, et al.* 396.

9. The power of removing certain municipal officers for negligence or malfeasance, and of declaring their offices vacant and ordering a new election, conferred upon the City Council of Lafayette by sec. 11 of the stat. of 29 April, 1846, to be exercised "by a vote of two thirds of that body," must be construed as meaning two thirds of that body as legally constituted by the presence of a quorum, and not two thirds of the whole number of members composing the council. *Warnock v. City of Lafayette*, 419.

10. Where a municipal corporation ratifies the tortious acts of its agents, it will be liable therefor, although those acts were not done by the authority of the city government.

11. The general rule in regard to the allowance of damages under our law is that established by art. 2294 C. C., by which the reparation must be equal to the injury. An exception is made to this rule by art. 1928 C. C. in relation to damages resulting from offences, quasi-offences, and quasi-contracts, which declares that in such cases much discretion must be left to the judge or jury; but this discretion is not unlimited, and, in this respect, our jurisprudence differs from that of England. *McGary v. City of Lafayette*, 440.

COSTS.

A party will not be liable for costs where she deposits in court the amount actually due by her; but where she contends that she is liable only for a sum less than the result of the litigation shows to have been due by her, she will be bound for the costs. *Allan, Executrix, v. Wills et al.*, 97.

COURTS.

I. Supreme Court.

1. The fact that a judge of the Supreme Court was absent from the bench at the time of the argument of a case, will not disqualify him from taking a part in its decision. *Matter of N. O. Improvement & Banking Co.*, on rule, 478.

II. District Courts.

2. The terms of the district court of New Orleans must be considered, for the purpose of appeal under the Statute of 22d

March, 1843, as monthly, although, in fact those courts sit continuously from November to July. *Cuddy et al. v. Belleville Iron Works Co.*, 582.

III. Courts generally.

3. An injunction will not lie to restrain a municipal corporation from instituting suits before a justice of the peace, against a party for infractions of an ordinance of the municipality, where an appeal will lie from the decisions of the justice to the Supreme Court. The jurisdiction of the justice cannot be thus interfered with. *Devron v. First Municipality*, 11.

CRIMINAL LAW.

I. Bail and Forfeited Bonds.

1. Though there be no proof that a judgment, rendered against the principal and surety in a bond taken by one of the recorders of the city of New Orleans for the appearance of the principal to answer a charge of assault and battery, was ever notified to the parties, it cannot be set aside, under the provisions of the stat. of 11 March, 1837, after the lapse of ten days from the date of an offer made, with the assent of the principal, by the surety, in court, to surrender his principal, and of an application by the surety for the cancelling of the mortgage resulting from the recording of the judgment in the mortgage office. *State v. Farron et al.*, 275.

2. Where a bond entered into by a prisoner and his sureties, under the stat. 11 March, 1837, s. 1, for the appearance of the principal at a term of court, does not describe the offence committed, nor that for which the party is bound to answer, the condition being merely for his appearance at a term of court and remaining there until discharged, no judgment can be rendered against the parties to the bond. *State v. Wooten*, 515.

II. Prosecution and Defence.

3. Where, at the instance of the counsel for the accused, the judge, in his charge to the jury, states his opinion as to the credibility of a witness, and, on the return of the jury into court for further instructions, repeats what he originally stated respecting the witness, the accused cannot object to it. *The State v. Summers*, 27.

4. Section 3 of the statute of 6 March, 1819, punishing any person "who shall inveigle, steal, or carry away any slave, so

that the owner of such slave shall be deprived of the use and benefit of such slave," creates several offences, and a separate indictment for any one of them would be good; but they may all be charged conjunctively in one count. When a statute enumerates several offences connected with the same transaction, or the intent necessary to constitute such offences, disjunctively, they may all be alleged cumulatively in one count, and in that event must be charged with the indictment conjunctively.

5. A *nolle prosequi* may be entered upon one count of an indictment, and a judgment be claimed on the remaining counts, even after a general verdict. *The State v. Banton*, 31.

6. Where a prisoner, on being brought to the bar, declares that he is ready for trial, and accepts the jurors summoned to pass upon the charges preferred against him, he cannot afterwards object that a copy of the indictment was not served upon him. *State v. Hernandez*, 379.

7. It is no objection to the validity of an indictment that several offences of the same nature, and upon which the same or a similar judgment may be given, are charged in different counts.

8. A count for larceny may be joined, in the same indictment, with one for receiving stolen goods.

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crimes and offences punishable by not more than two years hard labor, the proceedings may be by information," was not repealed by the abolition of that court, and the substitution of other district courts by the constitution of 1845; and the stat. of 30th of April, 1846, organizing the district courts in the parish of Orleans, having directed (sec. 6) that all informations shall be filed in the First District Court, and this direction being necessarily understood as relating to all such informations as were authorized by the laws then in force, of which the act of 1841 was one, that act must be considered as extended to the First District Court. *The State v. McLane*, 435.

CURATOR.

See SUCCESSIONS.

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See ABSENTEE.

DAMAGES.

I. *Ex Contractu*.

1. Where the term of payment of the price of land is uncertain and dependent upon the will and acts of the vendor, the debtor is not in default until notice is given him of the expiration of the term; and interest *ex mora* can only be recovered from the date of such notice. *Henderson et al. v. Blanchard*, 23.

2. To entitle a purchaser of a boat load of coal to recover damages of his vendor for a breach of contract, where it is shown that the latter had subsequently sold and delivered the coal to a third person for immediate use, proof of tender of the price is not required; such a tender would have been a vain thing.

3. In actions for damages for breaches of contract, the market value at the time of the breach, where there is a market value, is the measure of damages; the party being entitled to recover advances made and expenses incurred by him under, or on account of, the contract, and, in certain cases, interest.

4. In an action for the breach of a contract of sale for a cargo of coal, sold for a certain price, to be delivered to the purchaser at a certain place, at the expense and risk of the vendor, but resold the next day by the vendor to a third person for the same price, which was shown to have been the market price, the latter agreeing to take the cargo at the place at which it was

lying at the time of the first and second sales, the first purchaser can only recover as damages the expense of transporting the coal from the place at which it was sold to the place at which it was to have been delivered to him, and the value of the risk incurred in its transportation. *Marchesseau v. Chaffee*, 24.

5. Interest *ex mora* is, in all cases, the measure of damages. *Succession of Mana*, 29.

6. Where one, who had sold a tract of land in another State, with a warranty of title, by an act regularly recorded according to the laws of that State, acting under the impression that the sale did not convey the legal title, and with a view to defraud his vendee, sells the same land to a third person, who takes possession of it; but, by the *lex rei sitæ*, the original vendee could not have been evicted in an action by such third person, and his intrusion on the land, being a trespass which the original vendee might have prevented, giving him no claim against his vendor under his warranty, and there being no evidence of any damage to the first vendee by the acts of his vendor to which any definite value could be fixed, the first vendee cannot recover against his vendor either the value of the land, or damages for involving him in litigation by his fraud. *Layton et al. v. Chalon et ux.*, 318.

II. *Ex Delicto*.

7. In cases unattended with any of those circumstances which give rise to aggravated damages, the direct and immediate, or the natural and proximate, consequences of an act are alone to be considered, in ascertaining the responsibility for the commission of an act unauthorized by law. *C. C.* 1928, s. 2, 2294, 2304. *Gaulden v. McPhaul*, 79.

8. Where a slave found on leased premises is illegally taken by the landlord under a writ of provisional seizure, and he dies of a disease contracted during his imprisonment under the seizure, the plaintiff will be responsible for his value. *C. P.* 295. *C. C.* 2291, 2294. *Cox v. Myers*, 144.

9. No action can be maintained against a party for aiding a debtor in removing beyond the limits of the State slaves subject to a judicial mortgage in favor of plaintiff, where the evidence shows that the debtor possessed no other property, and that prior mortgages recorded against the debtor exceed the value of the slaves. *Per Curiam*: The plaintiff has sustained no injury, and can have no action; or if it be conceded that the plaintiff's *jus in re*, resulting from the general mortgage, is sufficient to authorize the action, the damages must be merely nominal. *Kemp, Tutriz, v. Nichols*, 174.

10. Where a raft of logs is accidentally stranded upon the land of another, and the proprietor of the land, though notified of the intention of the owner of the raft not to abandon it, cuts up the logs into firewood and sells them for a price exceeding, after deducting the cost of cutting them up, the value of the logs in their original condition, being a possessor in bad faith, and having thus put it out of his power to restore the thing in its enhanced condition upon being compensated for his labor, he will be responsible for the enhanced value of the timber when cut up for firewood, after deducting the cost of cutting it up. Such a possessor cannot be permitted to profit by his own wrong. C. C. 517, 518, 524, 2292.

Per Curiam: As the plaintiff has asked for an affirmation of the judgment, which allowed him the value of the wood in the form of firewood, after deducting the cost of converting the logs into that form, it is unnecessary to decide whether a possessor in bad faith, under such circumstances, is entitled to compensation for the labor of converting the wood into a more valuable form, which is, at best, questionable. *Eastman v. Harris*, 193.

11. In an action for damages for the destruction of plaintiff's carriage, caused by the neglect and imprudence of the driver of an omnibus alleged to belong to defendants, the latter may, under the general issue, offer proof that the omnibus had been leased by them to a third person at the time of the accident. The liability of defendants depending, not upon the ownership of the omnibus, but on the fact that the damage was done by their servant, it is no objection to such evidence that it is inconsistent with the denial of ownership of the omnibus in their plea of general denial. *Hart v. N. O. & Carrollton Rail Road Co.*, 261.

12. Interest may be allowed by way of damages. *Landreaux v. Marsoulet*, 334.

13. In an action for damages for an illegal arrest, if no probable cause be shown for the arrest, malice on the part of the person at whose instance it was made will be presumed. *York v. Chilton*, 377.

DEPOSIT.

A depositary who sells the deposit commits a theft. *McGregor et al. v. Ball*, 289.

DECISIONS AFFIRMED.

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DEFAULT.

See DAMAGES.

DELIVERY.

See SALE.

DOMICIL.

1. A planter who removes with his family to a village in an adjoining parish, for the purpose of having his children instructed at a school in the village, and occupies a house there, but who continues to perform the duties of a citizen of the parish in which his plantation is situated, and manifests, by continuous acts, his intention to retain his domicile there, cannot be sued in the parish to which he had removed with his family, for a merely temporary purpose. *McGehee v. Brown*, 186.

2. The domicile of a person is in the parish in which he has his habitual residence. C. C. 42.

3. The expression, "if a defendant reside alternately in different parishes," in art. 166 C. P. does not mean the passing of a certain portion of the day in one parish, and the residue in another, but the dwelling certain portions of the time in one parish and certain portions in another, as in the case of winter and summer residences in different parishes. *Hill et al. v. Spangenberg*, 353.

4. One who has acquired a domicile in the State cannot escape a constructive personal citation, and the personal jurisdiction of the court of that domicile, but by the acquisition of a domicile in some other parish of the State, or by an actual removal from the State. *Favrot v. Delle Piane*, 584.

DONATIONS.

I. Donations generally.

1. A donation *inter vivos*, with a reservation of the usufruct to the donor, being in violation of a prohibitory law (C. C. 1520), is null, and cannot be protected by the prescription of one year. *Dawson et al. v. Holbert, Tutrix, et al.*, 36.

2. The action of forced heirs, in which the sale from a parent to his children is attacked as containing a disguised donation, is not derived from the ancestor, but from the law. So far as their *legitime* is concerned they are not heirs, but creditors. *Rachal et al. v. Rachal et al.*, 500.

3. A donation of slaves and their increase, for the sole use and benefit of the donee, during her natural life, and at her death to the heirs of her body for ever; but, in the event of her dying without issue of her body and of her husband's surviving her, the husband to enjoy during his natural life all the use and benefit arising from the labor of the slaves and their increase, and, at his death, the slaves and their increase, to revert to the heirs of the body of the donor, and to be theirs for ever, creates a substitution, and is void.

4. The facts alleged in an application for a new trial on the ground of the discovery of new and material evidence since the trial, must be supported by an affidavit. C. P. 561.

5. An intervention will not be allowed, where its reception must retard the decision of the principal action. *Colvin v. Nelson*, 544.

II. Mortis Causa.

6. Where a resident of another State, who dies here without having acquired a domicile, leaves a testament executed in the

State in which he resided, the effect of such testament upon slaves and moveables in his possession in this State at the time of his death, must depend upon the jurisprudence of the State in which the testament was executed. *Succession of Wells*, 522.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

ERROR.

See OBLIGATIONS.

EVICITION.

See SALE, WARRANTY IN CASE OF EVICTION.

EVIDENCE.

I. Admissibility under the Pleadings.

1. Where in a petition to enjoin a sale, specific objections are made to the manner of advertising it, evidence will be inadmissible to establish other irregularities. The proof should be confined to the objections specified. *Dorsey v. Hills*, 107.

II. Competency of Witness.

2. The surety in a tutor's bond, cannot be released, for the purpose of testifying in favor of the tutor in an action against the latter to compel him to account, though other and sufficient security be offered by the tutor. *Moore et al. v. Thibodeaux*, 74.

3. Parol evidence is inadmissible, in the absence of any allegations of fraud, to contradict or alter a written act of sale. *Wilson v. Phillips*, 158.

4. In an action on a note signed by A., by which he promises to pay a certain sum, he appearing on the face of the note to be the only party liable for its amount, instituted against A. and another alleged to be part owner of a steamer for the price of which the note was given, A. cannot be sworn as a witness, at the instance of the plaintiff, to establish the liability of his co-defendant as a partner with him. He is incompetent on account of interest. *Ellis et al. v. Lawe et al.*, 245.

5. The testimony of witnesses is admissible to prove that a person, alleged to be the mother of a child, presented the child to the priest for baptism, and declared herself to be its mother, though the certificates

of birth and baptism of the child had been previously offered in evidence, by the same party, to prove the same facts. *Jobert et al. v. Pilot, Executor, &c.*, 305.

6. A member of the bar of a State in which the common law prevails may be examined as a witness, to prove whether a party, under the circumstances of his case, could recover in any action in that State. *Layton et al. v. Chalon et ux.*, 318.

7. An agent is a competent witness against his principal, in regard to the business of his agency. *Forman et al. v. Walker*, 409.

8. The fact that a witness is a son-in-law of the party by whom he was offered, is an objection to his credibility, but not to his admissibility. *Rachal et al. v. Rachal et al.*, 500.

9. The evidence of an attorney, in whose hands a note had been placed for collection, is admissible, for the purpose of preventing a double credit for the same payment, to prove that a credit endorsed on the note was written by himself, and that it was intended to be for the proceeds of certain property of the maker, which had been sold to make a payment on account, although the matter was not within his personal knowledge. *Per Cur*: The evidence does not contradict nor vary the written credit, but merely goes to show its origin and the motive of the party doing the act. The information of the attorney was secondary, and probably derived from his client; but to reject his statement on the ground of hearsay, would be a misapplication of the rule. *Sanders v. Huey*, 518.

10. An agent is a competent witness for his principal; his relation to the latter being merely a matter to be considered in estimating his credibility.

11. Whether a conviction and sentence for felony in another State of the Union will, or will not render a witness incompetent in the courts of this State, it is clear that any such disability will be removed by a pardon, where the disability was not annexed to the conviction of the crime by the express words of a Statute. *Klein v. Dinkgrave*, 540.

12. Where a witness, incompetent on account of interest, is admitted without objection, and testifies in favor of that interest, his interest in the event of the suit can only affect his credibility. *White v. McDowell and Husband*, 543.

III. Judicial Records and other official Instruments.

13. In an action for freedom a judgment rendered in a similar suit by a brother of

plaintiff, against the same defendants, establishing his freedom, on proof that his mother and grandmother were free long before the birth either of plaintiff or his brother, is not admissible in evidence. The judgment has not the force of *res judicata* as to the plaintiff, who was no party to it. The authority of the thing adjudged takes place only with respect to what was the object of the judgment, which was the freedom of the brother.

14. A judgment admitted to prove *rem ipsam*, establishes nothing more than that such a judgment was rendered. *Louis et al. v. Ricard et al.*, 87.

15. A judgment against the original debtor is *prima facie* evidence of the debt, against the holder of property sued in a revocatory action to set aside a sale of the property on the ground of simulation. The holder may controvert it by all legal means, but the burthen of proof is on him. *C. C.* 1967, 1971. *Fox v. Fox et al.*, 135.

16. A judgment obtained against a natural tutrix, ascertaining the amount due by her to her minor children, is not evidence against the defendant in an action to enforce the tacit mortgage of the minors against their tutrix on property in the hands of an assignee of one, who acquired by purchase at a judicial sale of the effects of the community formerly existing between the mother and the father of the minors, made before the date of the judgment. *Gales v. Christy, Assignee*, 293.

17. The authority of the thing adjudged is merely an exception, which the party who wishes to avail himself of it must oppose, in the manner and at the time prescribed by law. Unless the exception be thus opposed, the party will be presumed to have renounced the advantage resulting from it.

18. A judgment, rendered in another State, against one who had previously made a *cessio bonorum* here, though binding on him personally, is not conclusive against the other creditors, nor against the fund to be distributed here. *West v. His Creditors*, 447.

19. In an action here on a judgment obtained in another State, the testimony of a witness on the part of the plaintiff to show that the person in whose favor the foreign judgment was rendered was the mere agent of the party in whose name the action on it was commenced in this State, cannot be excluded on the grounds that such proof could only be made contradictorily with the person in whose favor the judgment was obtained, and that the transcript of the foreign proceedings, introduced by the plaintiff, could not be contradicted by testimonial proof. The testimony does not contradict

the record, but shows a matter not apparent on it and not inconsistent with it; nor is it necessary to make the plaintiff in the foreign proceedings a party, in order to establish that the person who sues here is the real owner of the judgment.

20. In an action in this State on a judgment obtained in another State, the foreign judgment, in the absence of any evidence impeaching the judgment, must be considered conclusive of matters properly investigated in the original action, as of the right of the plaintiff to sue, &c. *Lewis v. Wilder*, 574.

IV. Of Parties.

21. Where a party interrogated on facts and articles in relation to a verbal contract to transfer real estate, denies the contract, her answer cannot be contradicted by parol evidence; nor is parol evidence admissible to prove such a contract, in an action to recover damages for a breach of it. *Marionneaux v. Edwards*, 103.

22. The effect of the answers of a garnishee is to throw the burthen of disproving them on the other party. *Commissioners of Exchange Bank v. Yorke et al.*, 138.

23. As against himself and those he represents, a man's actions and representations will be presumed to correspond with the truth. They are in all cases evidence of the fact; and where a party has induced another to act on the faith of such representations, and where he cannot show the contrary without a breach of good faith and common honesty, such representations are usually absolutely conclusive. *Yales v. Christy, Assignee*, 293.

24. A party to an action, to whom an interrogatory is propounded by his adversary, may state in his answer any matter pertinent to the issue, and clearly connected with the facts which his adversary is seeking to establish. The answer may be qualified by the statement of facts which would prevent the consequences of an absolute and unqualified answer. *Amonett, Executor, v. Fisk*, 342.

25. Where interrogatories are propounded to a plaintiff, in answer to one of which he states that defendant is indebted to him in the amount sued for in an action against him as drawer of a bill of exchange, it will be unnecessary to make any further proof of his claim until the answer is rebutted by sufficient evidence. *Conrey v. Harrison et al.*, 349.

26. A party to a suit is competent to prove the loss of a paper on which his claim may depend, so as to authorize the intro-

duction of secondary evidence to establish its contents. *Pratt v. Wafer et al.*, 542.

27. A party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding.

28. One who opposed the seizure of slaves under a judgment, on the ground that they belonged to him, and whose title was, on the trial of the opposition, adjudged to be simulated and fraudulent, having purchased, pending the opposition, a judgment against his pretended vendor, opposed a subsequent seizure of the same slaves under the judgment under which they were first seized, claiming to be paid out of the proceeds of their sale in preference to the plaintiffs. Held: That he must be concluded by his previous claim to the ownership of the slaves on which he now pretends to hold a mortgage. If his claims to the ownership were true, the judicial mortgage would have been extinguished by confusion. C. C. 3374. *Gridley et al. v. Conner*, 416.

29. A mother, co-defendant with her son, may be interrogated on facts and articles; but her answers are not evidence against the son. They can only affect the party by whom they were made. *Rachal et al. v. Rachal et al.*, 500.

30. Where a party to an action resides out of the parish in which the court is held, his adversary cannot compel him to bring his commercial books into court; but he may be ordered to produce, under oath, a sworn copy of a particular account. It is not necessary that interrogatories should be propounded to the party to whom the copy is required. Interrogatories may be propounded, and the party required to annex to his answers copies of the accounts; but this is not the only mode of getting at the contents of an adversary's books. *Ludeling v. Frellsen*, 534.

31. A statement made by a party to an action is inadmissible in evidence, though offered to be proved by the answer of a witness, introduced by the opposite party, to a question propounded on his cross-examination, where the statement has no necessary or pertinent connection with any fact sworn to by the witness, and its admission was excepted to in time. *Dickson v. Grissom*, 538.

V. Of Evidence generally.

32. Where a party to a written instrument acknowledges therein that certain machinery had been furnished by the other party, but the acknowledgment does not enumerate the articles, parol evidence is admissible to prove what articles were furnished. Such evidence is merely explana-

tory of the acknowledgment; and goes neither against nor beyond it. *Larue v. Hampton*, 53

33. Though the defendant in an action on a lost note allege, under oath, that the note was a forgery, the testimony of witnesses will be admissible to prove a presentment of the note and her acknowledgment of its genuineness. In such a case, plaintiff will not be restricted to proof by witnesses who saw the defendant sign the act, or who know it to be her signature because they have frequently seen her write and sign her name, or by experts or comparison of writing. Article 325 C. P. is an exception to the general rule of evidence, and must not be extended beyond those ordinary cases to which it clearly applies. *Second, Agent, v. Roach*, 54.

34. Though the date of an ordinary written obligation to pay money is evidence of the date of the origin of the debt, the rule does not apply to bank notes.

35. Where the note of a bank is re-issued in the course of its daily business, the obligation of the bank is fixed by the re-issuing of the note; the date on its face is of no moment. *Hepburn et al. v. Commissioners of Exchange Bank et al.*, 88.

36. To confirm an act not binding on a party a formal instrument is not indispensable. Its voluntary execution involves a renunciation of the exceptions which might have been opposed to it.

37. A partial execution demonstrates, as well as an entire execution, the wish to confirm a defective act. It is a tacit approval. *Cobb et al. v. Parham et al.*, 148.

38. A memorandum in writing, though signed on Sunday, is admissible in evidence to prove a contract made on another day. *McCalop v. Hereford*, 185.

39. Hearsay evidence, admitted without exception, cannot be objected to afterwards. *Eastman v. Harris*, 193.

40. To make an account a stated account, it is not necessary that it should be signed by the parties. It is enough if it have been examined and accepted by both, and such acceptance may be inferred from circumstances. Hence, an account rendered will be deemed to be an account stated from the presumed approbation or acquiescence of the parties, unless objected to within a reasonable time. What is reasonable time must be determined with reference to the relations of the parties, or the usual course of business of the particular class of persons concerned. *Freeman, Syndic, v. Howell, Administrator*, 196.

41. There can be no ratification where there is no title.

42. One who had been a probate judge cannot, after he has ceased to hold the of-

fice, authenticate a sale made by him when in office.

43. Parol evidence is inadmissible to prove a title to real estate.

44. Parol evidence, inadmissible to prove a title to real estate, cannot be received to prove the nature of the possession of a party, in order to establish that, as a possessor in good faith, he was not liable for rent, and entitled to recover the value of his improvements. Where questions of title arise in actions for damages the proof required is the same as in petitory actions. *Bradford v. Cook, Tutor*, 229.

45. A certificate of the auditor of public accounts that, "upon examining the tax-roll for the parish of T. for the year—, there appeared to be assessed thereon, in the name and as the property of A. H., five hundred acres of land," is inadmissible in evidence; though proof had been previously made that the original tax-roll, which was required by law to be deposited in the office of the parish judge, could not be found there. The certificate disclosing the existence of a copy of the tax-roll in the possession of the auditor, an extract from that copy, properly certified, is alone admissible.

46. The certificate of a mere matter of fact by a public officer is inadmissible. If he was bound to record the fact, a copy of the record, duly authenticated, is the proper evidence. As to matters which he was not bound to record, his certificate is merely the statement of a private person, and therefore inadmissible. *Hughey et al. v. Barrow*, 248.

47. Although acts under private signature do not of themselves prove the date of their execution against third persons, their date may be established by other evidence besides the actual proof of the time of their execution. Any circumstances which renders the ante-dating of the act impossible will give effect to its date. *McGill v. McGill*, 262.

48. A commission directed to *E. R. Clyde*, but executed and returned by *Robert J. Clyde*, as commissioner, will be admissible, where the attorney by whom the commission was taken out makes oath that he is well acquainted with *Robert J. Clyde*, that he was the person intended to be made the commissioner, that he caused the name of *E. R. Clyde* to be inserted in the commission by mistake, and that there is no other person of the name of *Clyde* in the town to which the commission was directed.

49. The designation of a commissioner to take testimony by the initials only of his first and second names, though his surname be in full, is irregular; and should be objected to by the opposite party before add-

ing his cross-interrogatories. *Frieron v. Irwin*, 277.

50. Witnesses cannot be examined as to matters of law, which it is the exclusive province of the court to determine. *Zeringue v. White*, 301.

51. Where the testimony as to a judicial sale is conflicting, it will be insufficient to destroy the legal presumption that the sheriff did his duty. *Bacchus v. Moreau*, 313.

52. No objection to evidence will be considered on appeal, unless specified, and reserved, in a bill of exceptions. No notice will be taken of any agreement, alleged by the counsel of one party to have been made with the other party, that the evidence was received subject to all legal exceptions. *Succession of Prevost*, 347.

53. The production of papers in the possession of the opposite party may be required, even after the trial has commenced, where the party then discovers, for the first time, that his interests require them; *aliter*, where their importance must have been known to the party before the trial. *Plympton v. Preston*, 360.

54. Parol evidence is admissible to show the nature and extent of premises leased by an act *sous seing privé*, when, from the indefinite language of the written instrument, it is necessary, to ascertain the intention of the parties.

55. Where the intention of the parties is doubtful, the manner in which a contract has been executed by one with the assent of the other, will determine the construction to be put upon it.

56. Antecedent conversations respecting a contract which the parties subsequently embody in a written instrument, are inadmissible, where fraud is not charged. *D'Aquin v. Barbour*, 441.

57. Objections to evidence, though made in the lower court, will not be noticed on appeal, unless brought before the court by a bill of exceptions. *West v. His Creditors*, 447.

28. Where a party relies on a verbal sale of lands, alleged to have been made while the laws of Spain were in force, it is incumbent on him to show that the sale was made at a time when such transfers were authorized by law. *Badon et al. v. Bahan*, 467.

59. Simulation in written acts, when alleged by third persons or forced heirs, may be proved by parol. *Rachal et al. v. Rachal et al.*, 500.

60. A copy of a writing not authenticated by the proper officer is inadmissible, not being the best evidence in the power of the party offering it.

61. Where the witnesses to an act of partition *sous seing privé*, containing dona-

tions to the children of the party by whom it was made, are dead, and their signatures are proved, no objection can be made to the admissibility of the act in evidence, on the ground that it was not authentic. *Rachal et al. v. Rachal et al.*, 500.

62. It being material, in the interest of justice, that the motives and prejudices, as well as the means of knowledge, of a witness, should be laid before a jury, great latitude is allowed in his cross-examination. But this latitude is necessarily, to a certain extent, confided to the discretion of the judge of the first instance.

63. A jury will not be authorized to infer the existence of any bias or prejudice on the part of a witness against a prisoner, from the fact that the witness, though not an officer of the peace, and without any warrant, and not summoned by any officer to aid in arresting the prisoner, had taken great pains to do so. *State v. Brown*, 505.

64. Parol evidence of third persons of a verbal contract to sell land, will not support an action for specific performance, nor for damages. *Anderson v. Smith et al.*, 525.

65. An act of sale of land situated in another State, which appears to have been acknowledged by the parties executing it before a justice of the peace in that State, and is certified by the clerk of the court in whose office the act was recorded as a true copy from the records of his office, though accompanied by a certificate of the governor of the State of the official capacity of the clerk and of the certificate's being in due form, &c., is not admissible as evidence of the original act, but is simply a private writing, and must be proved as such. *Per Curiam*: There is no evidence before us that the certified copy of the act of sale would be received in evidence in any court of the State in which it was executed, without satisfactorily accounting for the non-production of the original. *Dickson v. Grissom*, 538.

66. Where a commission to take testimony in another State is addressed to "any judge or justice of the peace," at the place where the evidence is to be taken, without naming any one in the commission, the party offering the commission must show directly, or by circumstances authorizing a legal inference, that the person by whom the commission was executed, was, at the date of its execution, a justice of the peace of the State into which the commission was sent. A certificate of the Governor of the State, dated subsequently to the execution of the commission, stating merely that the person by whom the commission was executed, "is a duly authorized justice of the peace and that full faith and credit are due to his official acts," not written on

the same paper as the depositions, and there being no internal evidence in the papers that the justice's certificate was ever seen by the Governor, is insufficient to establish that the justice was qualified to act at the date of the execution of the commission. *Barelli et al. v. Lytle et al.*, 557.

EXECUTION OF JUDGMENT.

1. A *fi. fa.* issued from a district court and levied on property within the jurisdiction of another district court, may be enjoined by the latter.

2. It being the duty of the police jury of each parish to provide a sufficient house for the courts and jurors, and a good and sufficient jail to receive and keep prisoners, where buildings have been thus provided by a parish for the State, and are used and occupied for public purposes, they are not liable to seizure and sale under execution against the police jury. *Police Jury of West Baton Rouge v. Michel et al.*, 84.

3. Working animals may be seized separately from the plantation to which they are attached, when the debtor himself points them out to the sheriff for seizure. Under such circumstances the debtor cannot afterwards object to the seizure. *Dorsey v. Hills*, 107.

4. A creditor who has obtained a judgment, with an acknowledgment of his rights as a mortgagee, may seize other property than that mortgaged to him. All the property of the debtor is liable for the payment of his debts. *Cobb et ux. v. Hynes*, 150.

5. Parol evidence of the contents of books and papers, unless objected to, must receive the same consideration as the books and papers themselves. *Jouannaau, Curator, v. Shannon*, 330.

6. To make a valid seizure of a bill or note under a *fi. fa.*, the sheriff must take actual possession of it. *Gaines v. Merchants' Bank*, 369.

7. Simulation, as between the parties to an authentic act, cannot be proved by parol. *Gautier v. Briault*, 487.

EXCEPTIONS.

See PRACTICE.

EXECUTOR.

See SUCCESSIONS.

EXECUTORY PROCESS.

Executory process cannot be issued on a mortgage containing mutual covenants,

which was never accepted by the mortgagee, there being no authentic evidence that the latter ever bound himself to the implied covenants contained in the act. The institution of proceedings under the mortgage is not a sufficient acceptance to authorize the issuing of the executory process. The evidence on which executory process issues must be authentic. The judge, in granting the order, can take no cognizance of other evidence. *French v. The Mechanics' and Traders' Bank*, 152.

EXPERTS.

See AUDITOR.

FACTOR.

See MANDATE.

FIERI FACIAS.

See EXECUTION.

FIDEI COMMISSUM.

See DONATIONS.

FREIGHT.

See COMMON CARRIER.

FOREIGN LAWS.

See LAW AND CONFLICT OF LAWS.

FRAUD.

See OBLIGATIONS AND INSOLVENCY.

GARNISHEE.

Where interrogatories propounded by a plaintiff to a garnishee do not disclose the amount of plaintiff's judgment, and it is not shown to have been otherwise notified to the garnishee, judgment cannot be rendered against him, on his failure to answer, for the amount of plaintiff's judgment.

2. Where a plaintiff by whom interrogatories had been propounded to a garnishee, after a written motion to have them taken for confessed, goes to trial upon the merits,

without requiring the action of the court upon his motion, and permits the garnishee to offer his answers in evidence, without excepting to their being received, the answers must be considered as uncontradicted, and judgment may be rendered in accordance therewith. *Copley v. Snow*, 521.

3. Where a garnishee is interrogated by a plaintiff as to the time when a note, which had been in the garnishee's possession, was delivered to a third person, and the fact is important to the plaintiff, inasmuch as the note, if in possession of the garnishee at the time of service of the interrogatories upon him, would be subject to plaintiff's seizure, a failure of the garnishee to state in his answers the date of the delivery will be considered as a confession that he had the note in his possession when the process was served upon him. *Vason v. Clarke*, 581.

HABEAS CORPUS.

A suspensive appeal will not lie from an order discharging a prisoner under a *habeas corpus*, although the imprisonment grew out of proceedings in a civil action. *Ex-parte Emanuel*, 424.

HUSBAND AND WIFE.

I. Marriage.

1. After the lapse of a century, a marriage, which had never been doubted or denied, must be held to have been duly solemnized.

2. A marriage, celebrated in Louisiana, before the year 1787, may be proved by reputation. *Per Cur*: Under the laws of Spain, in force at that time, proof of marriage by reputation, was sufficient, in civil suits.

3. Decision in *Patton v. Philadelphia*, 1 An. 98, affirmed, so far as it declares that the regulations of the Council of Trent, in regard to marriages, were never extended to the colony of Louisiana, by the king of Spain.

4.. The certificate of a priest, attesting the celebration of a marriage in the Spanish colony of Louisiana, before the year 1787, though not signed by the parties nor by witnesses, is proof of a legal marriage.

5. Where the marriage of the parents has been proved, parol evidence is sufficient to establish the legitimacy of their children. *Succession of Prevost*, 347.

II. Separation from Bed and Board, and of Property.

1. Blows inflicted on a wife by her husband, will entitle her to a separation from bed and board. *Armant v. Her Husband*, 137.

2. Where in an action for a separation from bed and board, instituted by the husband, a curator *ad hoc*, was appointed to represent the wife, who was an absentee, but the case was tried without any issue joined, or judgment by default regularly taken, judgment cannot be rendered for the plaintiff. *Schnauser v. Schnauser*, 355.

3. Where the petition in an action for separation *a mensa et thoro* contains no prayer for a partition of the property of the community, and the defendant has had no notice of an application for that purpose, a separation of property cannot be decreed at the time of rendering judgment for a separation. *Edmonds v. Her Husband*, 489.

4. Proof that a judgment of separation of property had been obtained by a married woman against her husband, will not authorize a judgment against her personally for a debt contracted by her since the judgment of separation. *Per Cur*: A separation of property, though decreed, if not executed by payment of the rights and claims of the wife as far as the estate of the husband can pay them, made to appear by an authentic act, or by a *bona fide* uninterrupted suit to obtain payment, is null. C. C. 2402. *Longino v. Blackstone*, 513.

111. Dowry and Paraphernal Property.

5. Property given to the wife, on the express condition that it should be dotal, and which the husband received as such, cannot be regarded as community property. The wife is entitled to be paid the whole amount of her dowry, before the amount of the community property is determined. *Succession of Mossy*, 337.

6. The Statute of 27th of March, 1835, s. 2, which authorizes married women who have attained the age of twenty-one years, to renounce, by notarial act, with the consent of their husbands, in favor of third persons, their dotal, paraphernal, and other rights, provides that the notary, before receiving the signature of any married woman, shall detail in the act, and verbally explain to her, out of the presence of her husband, the nature of her rights, and of the contract she agrees to; and where such an explanation has not been made to her, the renunciation will be of no effect. A substantial compliance with the proviso is essential to the validity of the renunciation.

7. Where a husband purchases real estate at a sale of the succession of his wife's father, giving his notes for the price, and receiving a conveyance, and, in the partition of the estate among the heirs, the husband's notes are assigned to the wife as her share, and, after the homologation of the partition, the husband receives the notes from the parish judge, and gives a receipt for them as his wife's share, and there is no proof that the notes were ever delivered or paid by him to the wife, nor that she had the separate administration of her property, the wife will be entitled to a legal mortgage on all the property of her husband for the reimbursement of the amount of the notes. And in such a case, the reception of the notes, the circumstances of that reception, and their origin being proved, the burden of proving that they were afterwards given, or paid, by the husband, to the wife, is thrown on the party opposing the mortgage.

8. Decision in *Johnson v. Pilster*, 4 Rob. 71, that the word "same," in article 2367 C. C. relates not to the proceeds of the paraphernal property sold, as contemplated by the preceding clause, but to the paraphernal property itself, the law intending to secure the wife, in every case, where the husband disposed of her property for his individual benefit, affirmed. *Succession of Gremillon*, 411.

9. Where in a settlement between the father and the heir of the mother of the community which formerly existed between the parents, notes, which had been given by the husband of the heir for a loan previously made to him by the father, formed a part of the effects to be divided, and were received by the wife as her portion of the effects of her mother's succession, and delivered by her to her husband, the receipt of the notes and their delivery to the husband will not create a legal mortgage, in favor of the wife, on the property of the husband, in the absence of proof that the husband was solvent at the time his notes were delivered to him as his wife's share of the succession. In such a case the burden of proof is on the party claiming the legal mortgage. If the husband was insolvent at the time he received the notes, the wife has no mortgage for their amount. C. C. 3280, 2367. *Slatter v. Tete*, 465.

IV. Community

10. Where a wife, after remaining in this State, where her husband was domiciled, removes to another, in conformity with the decree of her husband, on account of superior advantages supposed to be afforded by the latter for rearing and educating their

children, and does not return, property acquired by the husband in this State during the absence of the wife will be community property. *Per Curiam*: We cannot say that, in discharging the duties of a mother at the place selected by her husband, she was rendering him no assistance. *Moore et al. v. Thibodeaux*, 74.

11. The husband, as head of the community, is bound to pay its debts. If he uses the separate funds of his wife for that purpose, he becomes her debtor for the amount. *Glasscock, Tutor, v. Green*, 146.

12. Where a husband purchased, during the existence of the matrimonial community, a settlement right on the public lands of the United States, and after its dissolution the government made to him individually a donation of land on account of the settlement of the party from whom he purchased the land, under the Spanish law then in force in this State, did not inure to the benefit of the community, but belonged exclusively to the individual to whom it was given. The rule that things given by the sovereign formed no part of the community, but belonged exclusively to the party to whom they were given, applied to all cases except where the donation was in remuneration for military services rendered to the sovereign by a husband, who had served without pay and been supported by the community. *Fuero Real*, b. 3. tit. 3, l. 3. But the right of the wife as to any improvements made on the property is distinct from her right to the property itself; the augmentation of value by the common labor alone makes a part of the acquets and gains. The facts that the improvements were not made by the spouses, but were purchased by them, does not affect the principle. *Hughey et al. v. Barrow*, 248.

V. Of the Law of Husband and Wife, generally.

13. In principle, no distinction can be made between a conventional transfer of property by a husband to his wife for the payment of her dotal or paraphernal rights, and one made under the form of judicial proceedings. *Per Curiam*: Where there has been an amicable suit in which the wife charges, and the husband confesses, a debt, and the judgment thus rendered is executed by the sheriff, the parties, so far as creditors are concerned, stand substantially in no better position than if they had merely clothed their contract with the form of a notarial act.

14. A husband cannot abandon in favor of his wife, a claim due to him, to the detriment of his creditors.

15. As a general rule, husband and wife are incapable of contracting with each other. The only exceptions to this rule are those enumerated in article 2421 C. C. Attempted contracts between husband and wife, not included in these exceptions, are nullities.

16. Actions to annul contracts made between husband and wife, not enumerated in the exceptions contained in article 2421 C. C. are not prescribed by one year under articles 1982, 1989 C. C. the nullity in such cases resulting from the incapacity of the parties to contract. That prescription applies where the transfer takes place between parties capable of contracting. *Hayden v. Nutt et ux.*, 65.

17. A marriage settlement executed in another State, where the property was situated and where the parties resided at the time, if valid by its laws, cannot be effected by the subsequent removal of the parties to this State. *Young et al. v. Templeton et al.*, 254.

18. A promise to pay a debt due by a deceased husband, made by the wife subsequently to his death, when the marital authority had ceased, is binding on the wife. *Succession of Guidry*, 488.

19. The rights of the spouses are governed by the laws of the place in which it was their intention at the time of their marriage to establish their domicile, and which they subsequently adopted within a reasonable time.

19. A tacit mortgage attaches in favor of the wife, on the property of the husband, for the price of paraphernal property sold by the latter, from the date of the receipt of the price by the latter; but no such mortgage exists in favor of the wife's heirs for the price of paraphernal property alienated by the husband after her death. C. C. 2367, 2380. *Walker et al. v. Duverger, Administratrix*, 569.

HYPOTHECARY ACTION.

See PRACTICE.

INDICTMENT.

See CRIMINAL LAW.

INJUNCTION.

1. An injunction will not lie to restrain a municipal corporation from instituting suits before a justice of the peace, against a party

for infractions of an ordinance of the municipality, where an appeal will lie from the decisions of the justice to the Supreme Court. The jurisdiction of the justice cannot be thus interfered with. *Devron v. First Municipality*, 11.

2. A *fi. fa.* issued from a district court and levied on property within the jurisdiction of another district court, may be enjoined by the latter. *Police Jury of West Baton Rouge v. Michel et al.*, 84.

3. An injunction will not be dissolved where the facts show that the party will be immediately entitled to resort to the same remedy; but such facts must appear on the face of the proceedings, or from evidence legally admitted, or received without objection. *Dorsey v. Hills*, 107.

4. The fact that a partial payment has been made on a judgment, which has not been credited on the *fi. fa.*, will not authorize an injunction for the entire amount of the execution. *Cobb et ux. v. Hynes*, 150.

5. Where a petition for an injunction is presented by a party who describes himself as a trustee, it is unnecessary that his capacity as trustee should be repeated in the affidavit.

6. Where on an application to obtain an injunction, made by several persons representing distinct interests, the affidavit is made by only one of the parties, and it does not appear either from the petition or the affidavit that he acted as the agent of the others, the injunction must be dissolved as to the parties by whom no affidavit was made. *Robertson, Trustee, &c., et al., v. Travis, Sheriff*, 151.

7. On the dissolution of an injunction by which the execution of a judgment was arrested, damages to the extent of twenty per cent on the amount of the judgment enjoined may be allowed without proof. *Ortez et al. v. Lallande et al.*, 188.

8. Where a judgment bearing interest has been enjoined, such additional interest only can be allowed, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest.

9. Section 3 of Statute of 25th March, 1831, authorizing the allowance of interest and damages on the dissolution of an injunction, applies to injunctions of orders of seizure, and sale in other cases than those enumerated in article 739 of the Code of Practice, in which the party is not required to give bond. *Dwight v. Richard*, 240.

10. Fees paid to counsel for prosecuting an injunction against an illegal order of seizure and sale cannot be recovered by the plaintiff against the defendant, where the injunction is maintained. *Hill v. Noc*, 304.

11. An affidavit by a party "that the facts set forth in the above petition, which in his opinion render an injunction necessary, are true to the best of his knowledge and belief," is insufficient to sustain an injunction, for uncertainty. It is susceptible of two constructions; one of which, that the party means to swear that such of the facts stated in the petition as, in his opinion, render an injunction necessary, are true, would render it defective. The affidavit must be clear and unequivocal, establishing all the facts which would warrant the interference of the court, and laying a clear basis for an indictment for perjury, if any of the assertions be untrue. *Rice v. Walsh*, 346.

12. Where the judgment enjoined bears interest at ten per cent a year, the court, on dissolving the injunction, cannot increase the interest. Whatever else it may be proper to allow, must be in the form of damages. *Gemard v. Hart et al.*, 503.

13. Where, in an action to enjoin a *fi. fa.*, an appeal is granted to the defendant, on motion and in general terms, it must be considered as embracing not only the plaintiff, but also the sureties in the injunction bond, who, by a fiction of law (Statute of 25th March, 1831, s. 3), are considered as plaintiffs in the injunction. *Mitchell v. Lay*, 514.

14. Though the petition for an injunction to stay an order of seizure and sale merely state that, remittances to a certain amount were made to the mortgagee which should have been credited upon the note to secure the payment of which the mortgage was executed, without mentioning the dates, manner, and amounts of the respective remittances, yet, if no exception be taken to the generality of the petition, and issue be joined on the plaintiff's averments, defendants cannot afterwards object to its generality. *Ludeling v. Frellsen*, 534.

15. The fact that an injunction bond was not signed by the surety in the presence of the clerk of the court, is immaterial, where the genuineness of his signature, and his sufficiency, are satisfactorily proved. The clerk's approval of the bond must be presumed from his having issued the injunction. *Claiborne v. Bauries*, 567.

INSOLVENCY.

1. A creditor of an insolvent has a right to require the production in court of the bank-book of the syndic to enable him to ascertain the state of the insolvent's affairs. *McAuley v. His Creditors*, 52.

2. Where the creditors of an insolvent are the parties in interest in a contest as to

a privilege claimed by one of them, the claim cannot be established by an action against the syndics, they represent the mass and not individual creditors. *Posey et al. v. Weems, Syndic, et al.*, 195.

3. A judgment confessed by an insolvent after a *cessio bonorum* made and accepted, cannot affect the property ceded, which, from the time of the cession, was vested in the creditors; nor will such a judgment in favor of the vendor of moveables, who had sequestered them before the cession, confessed, after the cession, by the insolvent, who had released the property on a bond before his cession, be binding on the surety in the sequestration bond. *Herrick v. Conant*, 276.

4. Where a debtor is insolvent to the knowledge of his creditor, who receives from him, in payment of an antecedent debt, goods upon which he has no privilege as vendor, the preference is an illegal one. C. C. 1965 to 1989. *Florance v. Nolan et al.*, 327.

5. It is not necessary, to subject a party to the penalties imposed by the tenth section of the Statute of 28th March, 1840, abolishing imprisonment for debt, on one purchasing merchandize for cash, and disposing of the same, or removing it beyond the reach of his vendor, without having paid the price, that he should have been the principal in the transaction, where it is shown that the purchase of the articles was a fraud contrived between another person and himself, probably for their mutual benefit. The law will hold both to have been purchasers.

6. Article 107 of the Constitution relates exclusively to criminal proceedings.

7. Judicial proceedings, having for their object the incarceration of the debtor to compel the payment of his debts, or instituted against a debtor guilty of fraud, have always been held by our courts to be civil, and not criminal proceedings. Proceedings against an insolvent debtor for fraud, under the Statute of 28th March, 1840, are civil proceedings. *Martin et al. v. Chrystal*, 344.

8. The mere institution of an action, by the creditors of one who had made a *cessio bonorum* under the Statute of 1817, and who had since acquired other property, to compel a new surrender, does not render the insolvent incapable, from the commencement of such action, of alienating his property in favor of a *bond fide* purchaser. Under that statute, such newly acquired property cannot be considered as thenceforth in the custody of the law. Until a judicial investigation has been had, and a decree pronounced, the further liability of the insolvent is a matter *en pais*. Any other con-

place between the transferrer and the transferee, by the giving of the title. C. C. 2612. The titles in this case are the receipts; and by "grantee" the act of 1842 means the owner of them. *Ferry v. Hennen*, 458.

23. A confirmation, by commissioners appointed to ascertain the rights of persons to lands, of a claim for a specified number of acres between certain boundaries, being a complete grant from the United States, cannot be affected by any errors committed by officers of the government, in surveying and locating the claim. *Fay v. Chambers*, 481.

24. Improvements made upon the public lands of the United States, where the party making them is not in a situation to avail himself of the pre-emption laws, cannot form the object of a contract. The value of improvements so made cannot be recovered from a purchaser of the land from the United States; and, if possession of the land be retained from the latter by the person who made such improvements, damages will be allowed for the detention.

25. Art. 500 of the Civil Code is not applicable to materials used, nor labor expended, in making settlements on the national domain of the United States. *Hollon v. Sapp*, 519.

26. Where the United States have recognized the claim of one of two persons pretending to be settlers on the public lands and have issued a patent to him, the courts of this State have no power, in the absence of any equities or evidence taking the case out of the general rule, to revise their decision. *Jones v. Wheelis*' 541.

LAW.

See CONFLICT OF LAWS.

I. Of Law generally.

1. The stat. of 16 March, 1848, ch. 191, purporting to amend the stat. of 4 May, 1847, by reference to its title only, and its provisions being necessarily inoperative without a reference to the stat. of 1847, the first section must be considered as in direct conflict with arts. 118, 119, of the Constitution, and any appointment made under it as void. *Walker v. Caldwell*, 297.

2. Art. 1987 C. C. is repealed by art. 647 C. P., so far as they are inconsistent with each other. *Conrey v. Copland*, 307.

II. Commercial Law.

3. The commercial law, as settled in the other States of the Union, is uniformly fol-

lowed by the courts of this State, where no statutory provision prevents a resort to it. *Thompson, Ex'r, v. Mylne*, 206.

4. A sale of derelict or wrecked property, made under a statute, will not be valid unless there has been a substantial compliance with its requisitions.

5. Where one who had been authorized by a justice of the peace, under the provisions of the stat. of Arkansas of the 21st of February, 1838, s. 9, relative to the re-shipment and sale of wrecked property, to ship such property to any market where he might deem it most likely that a good sale could be made of it, sells the property, by private sale, after its shipment, to the clerk of the steamer on which it was shipped, the sale will be without effect. *Per Cur*: No application was made for permission to sell on the spot. Had such a sale been authorized, the sale would have been required to be public, after due notice, and at auction, to the highest bidder.

6. Where wrecked property is in safety, the salvor cannot sell it. A case of necessity may exist in which the power of the salvor to sell may be recognized; but, short of such a case a salvor has no more authority to sell than a captor has. *McGregor et al. v. Ball*, 289.

III. Common Law.

7. By the laws of Mississippi, no covenant or agreement in consideration of marriage, nor any deed of marriage settlement or deed of trust, though the consideration be a valuable one and the *bona fides* of the parties unquestionable, is good against creditors, unless acknowledged by the parties bound thereby, or proved before a judge of the Supreme Court, or a justice of the county court, or justice of the peace, or notary public of the county in which the lands, tenements, and hereditaments, or some part thereof, are situated, and unless a certificate of such acknowledgment or proof, written upon said instrument, and signed by the officer before whom it was made, be lodged with the clerk of the county court of the proper county, to be there recorded in the same manner as other deeds of real or personal estate are required by law to be acknowledged or proved. A marriage settlement, not duly acknowledged or proved, and recorded, is not void merely as to creditors having liens on the property to be affected, but is void as to all creditors whosever.

8. On a question arising under the laws of another State, in which the English common law, so far as adapted to our constitutions and consistent with our form of govern-

ment, and not repealed or modified by statute, is in force, and where the principles of the English equity jurisprudence also prevail, and where the courts are authorized to look to English authorities in equity for rules of decision on questions turning on the principles of equity, the courts of this State will be bound to notice any thing applicable in principle, which it finds laid down in approved works.

9. In those States in which the common law prevails, a general lien on land resulting from a judgment, constitutes, *per se*, no property or right in the land itself. It confers only a right to levy on the land, to the exclusion of other adverse interests subsequent in date to the judgment, and can only be made effectual by a levee.

10. A deed, executed in a State where the English common law prevails, conveying property to a trustee, for the benefit of creditors of the grantor, though fraudulent and void as to creditors, is sufficient to divest the legal title of the grantor, and conclusive against him. And where the property so conveyed in trust for the creditors, is subsequently conveyed by the grantor to a trustee as a marriage settlement, it can only confer on the intended wife, or on her trustee for her benefit, the right to have a conveyance made to her of the property when the prior deed shall have been satisfied or otherwise discharged. It creates in her favor a lien in equity only, of no validity against a creditor until actual notice, or the filing of a bill asserting such lien, which is constructive notice; and where a judgment creditor, who, by reason of the conveyances in trust for the creditors, has but a lien in equity upon the property conveyed, instead of a legal lien, files his bill in equity before any actual or constructive notice of the deed of marriage settlement, his right to subject the property to his debt will take precedence of that of the wife. As the judgment creditor would prevail in Mississippi over the wife, by reason of his earlier assertion of his equitable claim by a bill in equity, the husband cannot, by subsequently removing slaves, which formed a portion of the property to this State, create a right of priority in her favor. *Young v. Templeton*, 254.

11. Under the common law, the title of the owner of personal property cannot be lost without his free consent.

12. No authority from the real owner to sell personal property is implied, by the common law, from the naked possession of the property by a third person, without the consent of the owner, under circumstances which ought to have put a purchaser from the latter on enquiry as to the origin of his possession and his title. *McGregor et al. v. Ball*, 289.

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LEASE.

1. Where a lessee, who had bound himself not to sub-let any part of the premises for more than one year, sub-lets a part for nine months, covenanting to renew the lease on the same terms from year to year for the residue of his own term, the sub-lease is a violation of the prohibition, and will authorize the lessor to demand the rescission of the lease. C. C. 2696, 2700.

2. The prohibition to sub-let is always construed strictly against the lessee. Such a prohibition is not personal to the original lessor; but, in the absence of any stipulation to the contrary, the whole contract may be assigned by the lessor to a third person. *Cordetiole et al. v. Redon*, 40.

3. Slaves are not subject to provisional seizure to secure the rent of the premises on which they are found, though the tenant have no other property. The right of the lessor to a provisional seizure can be exercised only on movable effects found on the premises. C. C. 2675. *Cox v. Myers*, 144.

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1. The object of the statute of 18 March, 1844, is to enable mechanics and other workmen employed by a contractor to obtain the benefit of any amount due to him by the proprietor.

2. Where one who has contracted to erect a building, after having performed part of the work, becomes unable to fulfill his contract, the proprietor, on his default, may proceed to complete the building; and, if the amount expended in its completion, and the damages to which the proprietor may be legally entitled in consequence of the default, do not equal the unpaid instalment stipulated for the work, the contractor will

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1. The object of the statute of 18 March, 1844, is to enable mechanics and other workmen employed by a contractor to obtain the benefit of any amount due to him by the proprietor.

2. Where one who has contracted to erect a building, after having performed part of the work, becomes unable to fulfill his contract, the proprietor, on his default, may proceed to complete the building; and, if the amount expended in its completion, and the damages to which the proprietor may be legally entitled in consequence of the default, do not equal the unpaid instalment stipulated for the work, the contractor will

have, to the extent of the residue, a claim, *ex æquo et bono*, for his unpaid work. In the absence of evidence to the contrary, it will be presumed that the proprietor has been benefitted to that extent.

3. Where a proprietor paid to one with whom he had contracted for the erection of a building an instalment before it became due under the contract, and the contractor subsequently failed, and the proprietor finished the building for a sum not exceeding the next and last instalment, and the amount of the instalment so paid in advance, after deducting from it the damages recoverable under the contract, was enough to pay the mechanics and other workmen who had notified the proprietor of their claims before the period at which the instalment so paid in advance became due, the proprietor will be responsible for the amount of their claims.

4. Mechanics, laborers, and furnishers of materials employed by one who has contracted for the erection of a building, are only entitled to the same privileges as the contractor, and where the contractor has failed to register his contract as required by law, those employed by him have no privilege. Stat. 18 March, 1844, s. 4. C. C. 2743, 2744, 2746, 3239. *Allen, Executrix, v. Wills et al.*, 97.

5. A creditor for money loaned to a contractor for the erection of buildings is not within the stat. of 18 March, 1844. No privilege is conferred on such a creditor by that statute.

6. The stat. of 18 March, 1844, confers on mechanics, laborers, and furnishers of materials a privilege on the amount due by the proprietor, and a privilege on the building. If the contractor has not secured himself a privilege upon the building by recording his contract, he must rank as an ordinary creditor of the proprietor, and the mechanics, &c., cannot be subrogated to a privilege which does not exist; but this does not effect their privilege on what the proprietor owes. *The First Municipality v. Bell et al.*, 121.

LEVEES.

1. One who sues the owner of a tract of land for compensation for work done on a levee, which proves to have been of no use whatever to the proprietor, must establish that the work was done by virtue of and in accordance with the law, and the regulations of the police jury. The word *levee* has a technical meaning fixed by the stat. of 7 February, 1829, and one claiming remuneration for constructing a levee, where there has been no adjudication to him, nor

acceptance of the work by the inspector, and it is shown that the proprietor has not benefitted by it, must show that the work was a levee within the meaning of that statute. *O'Reily v. Oakey*, 21.

2. One who has constructed a levee on the lands of an absentee, under an adjudication made by the police jury, which has been accepted by the inspector, in case of the lands not selling for the amount of the adjudication and of there being no other property of the absentee within the parish, may recover the balance from the police jury. *Knox v. The Police Jury of West Baton Rouge*, 62.

3. A question as to the breadth of land which a municipal corporation has a right to require for the construction of a road and levee is, within certain limits, an administrative question, to be left to the discretion of the local authority. *Mayor, &c. of Thibodeau v. Maggioli*, 73.

4. Article 3411 C. C. applies to the abandonment of the possession of movables only. An abandonment of the title to land must be made in writing.

5. Where a road and levee ordered by the police jury to be constructed on a tract of land is adjudicated to the proprietor of the land for a certain sum, who complies with the terms of the adjudication, being himself, as proprietor of the land, the first party bound to pay the amount of the adjudication, his claim will be extinguished by confusion. *Hereford v. The Police Jury of West Baton Rouge*, 172.

LICENSES.

See TAX.

LITIGIOUS RIGHT.

See OBLIGATIONS.

MANDATE.

1. Where one of two innocent persons must suffer, he ought to do so who has placed his property in the hands of a careless agent, rather than one who acts in good faith and on his confidence in what the agent has done. *Walker v. Cassaway*, 19.

2. The power to represent a principal in the defence of actions, is not one of administration. Such a power can result only from the express terms of an instrument, or from an implication so clear as to be irresistible.

3. A mandate which authorizes the agent "poursuivre le recouvrement de toutes

créances, par toutes voies de droit—à ce faire, paraître en justice tant en demandant qu'en défendant," empowers the agent where an action has been legally instituted against the principal, as by attachment, &c., to appear and accomplish the purpose of the mandate—the collection of debts due the principal, by pleading in compensation or reconvention; but it confers no such general authority to defend actions as will render service of citation on the agent sufficient. *Fuselier, Administrator, v. Robin*, 61.

5. When an agent makes a purchase for himself which he was bound to make for his principal, the latter may, if he choose, take the purchase, and the agent will be bound to account to him for it; but this principle cannot prevent an agent from purchasing a judgment against his principal, though to the detriment of the creditors of the latter. *Commissioners of Exchange Bank v. York et al.*, 138.

6. As a general rule the trust reposed in an agent is personal; but this is modified by the usages of trade, where the interest of the employer and reasonable convenience require the custody of the property to be delegated to another.

7. When the nature of the business requires the employment of a sub-agent, the agent is not ordinarily responsible for the negligence or misconduct of the latter, if reasonable diligence has been used in the choice of such sub-agent.

8. An agent cannot be made responsible to his principal for exceeding his powers, where no injurious consequences are proved to have resulted therefrom to the latter. *LeDoux et al. v. Goza*, 160.

9. By the custom of this State, it is understood between planters and their factors that the latter are to render accounts annually, after the sale of each crop, and, if the balance in favor of the factor is not paid, that interest is to be charged on such balance, at the rate agreed on, though made up of capital and interest. *Thompson, Executor, v. Mylne*, 206.

10. A third person can derive no benefit from an usurpation of power by an agent on whose acts he relies, where such usurpation was known to him. *Union Bank of Louisiana v. Jones*, 236.

11. A party to whom goods were shipped with directions to sell them for cash, delivered the goods to a purchaser at a cash sale; but, in compliance with a custom of the place, as to such sales, to deliver goods and call for the price three or four days after, did not require payment at the time of delivery, but called in the evening of the day of the sale, and for several successive days, without obtaining payment. The

agent suffered several weeks to elapse without making any attempt to secure the price, though he must have suspected that the debtor was in failing circumstances, and might have recovered the goods or secured the price. There is no proof that such an attempt would have been fruitless. In an action by the shipper to recover the price of the goods: *Held*, that defendant was responsible for the price, having failed to show due diligence to collect the debt. *Montgomery et al. v. Wood et al.*, 298.

12. Where obligations have been placed in the hands of an agent to collect, it is not sufficient for him, after some time has elapsed, to offer to return them, without showing that he exercised ordinary care and industry to obtain payment. *Livaudais v. Denis, Executor*, 300.

13. An agent, in possession of a bill endorsed in blank, may maintain an action on it in his own name. The fact that the bill belonged to a third person is unimportant, except to enable the defendant to oppose any equitable defence against the true owner. *Conrey v. Harrison et al.*, 349.

14. A general power to buy property for the principal, or to make any contracts and do any other acts whatever which he could if personally present, by the common law, as well as by our law, must be construed to apply only to buying or contracting in connection with his ordinary business, and will not authorize the making of any contracts of an extraordinary character.

15. A power of attorney executed by a single woman, so far as it confers powers beyond the administration of a plantation belonging to her, with the management of which the agent was charged, will be revoked by her subsequent marriage.

16. Advances for the principal, made to one who had acted as an agent, but subsequently to the termination of his agency, cannot be recovered from the principal, unless shown to have inured to his benefit. *Reynolds et al. v. Rowley et al.*, 396.

17. One who purchases a bill of exchange from an agent, duly authorized to draw upon his principal, on shipment to the latter of produce purchased for him, has nothing to do with the limitations fixed by the principal as to the price of the produce, unless proved to have been aware of them.

18. Where an agent is authorized to ship to his principal, and to draw on him, "with bill of lading attached," it is unimportant that the bill of lading be not materially attached or fastened to the bill of exchange. It is sufficient that the bill of exchange be drawn on the shipment, and that the bill of lading be delivered with it to the purchaser of the bill. *Forman et al. v. Walker*, 409.

19. Where a debtor transfers to his creditor the notes of a third person, bearing interest at ten per cent a year, for an amount exceeding his debt, to enable the creditor to pay himself, and the latter finding on a settlement with the maker of the notes that he was entitled to credits which reduced the sum due below the amount of the notes, but left a balance exceeding the amount due by the transferrer of the notes, takes new notes from such third person, payable to himself, which are admitted to be good, for the whole balance due by him, bearing interest at ten per cent a year, the debtor will be entitled to recover from his creditor, by whom the new notes were taken, the amount by which the new notes exceeded the sum due to the creditor supposing so much of the new notes to remain unpaid, with interest at ten per a year from their date; but, the principal having adopted the novation, the agent must be allowed, if he choose; to give the unpaid new notes in payment *pro tanto*. The institution of an action against his debtor to recover the balance due him with interest at ten per cent a year from the date of the new notes, will be considered as an adoption of the novation. Art. 2984 C. C., which declares that "the attorney is answerable for the interest of any sum of money he has employed for his own use, from the time he has so employed it, and for that of any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over," making the agent responsible only for *legal* interest, must be construed in connection with other principles of the law of agency, which declare that profits made by the agent, whether in the ordinary course of the business of the principal, or by a violation of his duty as agent, should belong to the principal. C. C. 2974. [*Eustis, C. J. and Rost, J., dissenting.*]

20. Art. 2984 C. C. was enacted in the interest of the principal, and not to shield the unfaithful agent; and should be so construed as not to conflict with other rules adopted by the law in favor of the principal, and to secure strict good faith in the agent. [*Eustis, C. J. and Rost, J., dissenting.*] *Stanfield v. Tucker, Executor*, 413.

21. Where a municipal corporation ratifies the tortious acts of its agents, it will be liable therefor, although those acts were not done by the authority of the city government.

22. The general rule with regard to the allowance of damages under our law is that established by art. 2294 C. C., by which the reparation must be equal to the injury. An exception is made to this rule by art. 1928 C. C. in relation to damages resulting from offences, quasi-offences, and quasi-contracts, which declares that in such cases

much discretion must be left to the judge or jury; but this discretion is not unlimited, and, in this respect, our jurisprudence differs from that of England. *McGary v. City of Lafayette*, 440.

23. Where an agent, authorized to purchase grain for his principal, contracts with a third person to take "all the grain he could deliver within a certain time," the contract will not be binding on the principal. *Per Curiam*: The agent undertook to bind his principal for the purchase of grain, but the other party did not bind himself to sell any. Principals may make what contracts they choose; but the power to make a contract of this sort cannot be deduced from any general authority. *Hartwell v. Walker*, 457.

24. Where a partner charged with the settlement of the partnership employs an agent to act for the benefit and in the business of the partnership, and the latter, even by the express direction of that partner, applies the money of the partnership in his hands to the payment of the individual debts of that partner, or otherwise to his use, he violates his duty as the agent of the partnership, and will be liable to its creditors. Had he delivered the money to the liquidating partner, he would not be answerable for its subsequent appropriation by the latter to his own use. *Dwight, Syndic, v. Simon et al.*, 490.

25. An agent employed to make or conclude a contract has not, as a matter of course, any incidental authority to receive payments which may become due under it. *Tew v. Labiche et al.*, 526.

26. Where the owners of merchandize consigned to an agent for sale, in answering a letter containing an account of the sales, writes with full information of all the circumstances under which it was made, that "The sale leaves us a very serious loss, but we suppose you acted for the best; we should have preferred holding on to selling at such low figures," it amounts to a ratification and approval of the sale. *Howland et al. v. Fosdick et al.*, 556.

MARRIAGE.

• See HUSBAND AND WIFE.

MINORS.

I. Tutors and Curators of.

1. Where a surviving father claims to have the interests of minor children in property forming part of the community of acquets and gains adjudicated to him, and the

adjudication is recommended by a family meeting, the under-tutor alone has a right to oppose it in behalf of the minors. Relations of the minors have no right to interfere in such a case, on their behalf. In the event of a collision of interest between the father and natural tutor and the child, the duty of representing the minor is confided to the under tutor. *Succession of Hebert*, 77.

2. Where one who purchased, in his own name, slaves sold at a judicial sale, applies to the probate court, alleging that he bought them as an investment of funds of minors to whom he was under-tutor, and praying for a family-meeting to consider the propriety of adopting and confirming the purchase on behalf of the minors, and they recommend its adoption, and that the under-tutor be authorized to execute his notes for the credit part of the sale, and the deliberations are homologated and the under-tutor authorized to execute the acts, but, on the next day, he subscribes notes and consents to a mortgage in his own name, without mentioning these proceedings, the minors will not be bound thereby. *Per Curiam*: The purchase having been made by the party in his own name, there was no contract to ratify; the alleged ratification was a sale from the under-tutor to the minors; and article 1788 C. C. is inapplicable to such a case. *Hall et al., Syndics, v. Woods*, 85.

3. In an action for the slander of title to property judgment may be rendered ordering the defendant to institute, within a certain period, a suit to establish his pretensions to the property, and this judgment, on the failure of the defendant to comply with it, will stand to the plaintiff as a perpetual default of the defendant; but the court has no power to fix a term within which the defendant must set forth his title or institute suit, under the penalty of being forever after precluded from asserting his claims. *Packwood v. Dorsey*, 90.

4. One who purchases the right of action from a minor against his tutor, can acquire no greater right against the latter than his assignor had; and the tutor may make the same defence to the action, and avail himself of the same means as though the suit were brought by the pupil himself; and if the defendant has become the creditor of his pupil by any advances made to him since his majority, and previous to the purchase by the plaintiff, he will be entitled to set them up in defence to the action. *Leftwich et al. v. Brown*, 104.

5. It is no objection to the right of a tutrix of the minor heirs to sue for the removal of the administrator for neglect of his duties, that the plaintiff, although an order

had been made for her appointment as tutrix, had not furnished the bond and security required by law. Art. 332 C. C., the object of which is to prevent the tutor from assuming the administration of the minor's estate before furnishing the required security, does not apply to an action for the removal of an administrator. Proceedings for that purpose are governed by art. 1018 C. P., which authorizes an heir, creditor, or other person concerned, to pray for the removal of an administrator. *McComas, Tutrix, v. Ronquillo, Administrator*, 123.

6. In an action by an under-tutor to remove a tutor, the accounts of the latter may be investigated for the purpose of proving his mal-administration; but an under-tutor has no authority to require a rendition of accounts by the tutor. After the dismissal of a tutor the right to call for an account belongs exclusively to the new tutor.

7. A judgment in an action instituted by an under-tutor against a tutor praying for his removal and for an account of the tutorship, may be annulled so far as it compels the tutor to account to the under-tutor, and be left in force so far as it decrees the removal of the tutor.

8. A tutor owes his wards in all cases the funds which he receives belonging to them, with legal interest, and he can only shield himself from that responsibility by investing those funds, in their name, under a judgment of the court, rendered on the advice of a family meeting.

9. Where a tutor permits notes belonging to the estate of the minor to be barred by prescription, without showing any attempt to collect them, or offering evidence to prove that they could not be collected, he will be liable to the minor for their amount. *Mongel, Tutor, v. Walker et al.*, 214.

10. A tutrix cannot, without being specially authorized, execute a note in the name of her pupil, which will be binding on the latter. *White v. McDowell and Husband*, 543.

11. Where one who is under-tutor to a minor, borrows funds belonging to him, his responsibility, so far as he holds funds belonging to the minor, cannot be distinguished from that of the tutor; nor can the nature of that responsibility be changed by the form in which he may choose to pay the debt. *Bird v. Pate, Administrator*, 225.

12. Where a tutor sells a lot of ground belonging to him individually, on which a legal mortgage existed in favor of his pupil, taking a note payable to himself individually for the price, and, without any legal transfer of the note to his pupil, sues on it as tutor, and recovers a judgment as such with a special mortgage on the property, and receives from a purchaser of the property at

a sale subsequently made by the sheriff, the amount of a note given for the price, the tacit mortgage in favor of the minor will be thereby annulled; and the purchaser, holding under a judgment and judicial sale clothed with all the forms and solemnities of law, will not be allowed to be prejudiced by the misrepresentations of the tutor. *Per Curiam*: Third persons acquiring rights in good faith, under such a judgment, have nothing to look to beyond the judgment and the proceedings under it. If the minor be injured by the misrepresentations of the tutor, the remedy is against him, and the surety on his bond. *Pike et al v. Mongel, Tutor*, 227.

13. The receipt by the tutor of a portion of the price of land belonging to minors, can never be construed into a ratification of a sale, to their prejudice. *Bradford v. Cook, Tutor*, 229.

14. A tutor, appointed under the provisions of section 4 of the stat. of 10 March, 1834, on the express condition of his being exempted from giving security, cannot be subsequently required to give security, though the property of the minor, which, at the time of his appointment, consisted chiefly of real estate, has been since converted into money and negotiable paper, for the purpose of affecting a partition. *Succession of Destrehan*, 367.

15. Where, after a judgment rendered on the opposition of the tutor, rejecting the application of a minor, under the stat. of 23 January, 1829, to be emancipated before attaining the age of twenty one years, the minor marries without the knowledge or consent of his tutor in another State, the marriage will not have the effect of emancipating him, nor will it authorize him to demand an account and settlement of the tutorship. Art. 367 C. C. which provides that the minor is emancipated of right by marriage, relates to marriages authorized by law, not to those contracted in fraud of its provisions. *Maillefer v. Sailot*, 375.

16. An action against a tutor for neglecting to collect a debt due to the minor, is prescribed by four years, from the majority of the latter. C. C. 356. *Fontenot v. Fontenot*, 488.

17. The natural tutrix of a minor child may emigrate to another State of the Union, and take her infant child with her.

19. Although a natural tutrix who marries, without being authorized by the judge on the advice of a family meeting to retain the tutorship, will lose it, yet she may be subsequently appointed, as any other person, dative tutrix; and where the tutorship was forfeited by the marriage of the tutrix in another State, to which she had emigrated, she may be there appointed guardian

of the minor and will stand in the position of any guardian of a minor appointed in the State to which she had removed; and under the stat. of 1 April, 1843, she may, on proof of her appointment, without qualifying as tutrix here under our laws, compel one who had been subsequently appointed tutor to the minor by a court of this State, to account; and, where it is shown that the debts of the succession through which the property descended to the minor have been paid, she may receive the funds in his hands, and take possession of the immovables.

18. Lands of a minor, situated in this State, cannot be sold though at the instance of a foreign tutor, without the advice of a family meeting. Such a tutor has full power to administer by an attorney in fact, the real property of his pupil situated in this State; but the rules regulating the alienation of the real property of minors are uniform, and independent of the tutor's domicile.

20. Sec. 2 of the stat. of 1 April, 1843, allowing any tutor or guardian, appointed in another State of the Union, to remove the property of his pupil from this State, applies to cases in which the estate of the minor has been converted into money; but does not authorize the sale of real property belonging to the minor situated here, without the advice of a family meeting. *Bailey v. Morrison et al.*, 523.

II. Of Minors generally.

21. A minor will not be bound by a purchase, though ratified by a family meeting whose deliberations have been homologated by the court, where the purchase exceeds his available means, and instead of being an investment is a speculation which may involve him in debt and difficulty. *Hall et al., Syndics v. Woods*, 85.

22. Minors will not be bound by a promissory note signed by their tutor in his official capacity, in the absence of proof of judicial authority to make the note, or that its consideration inured to their benefit. *Succession of Johnson*, 253.

23. A surviving parent, who is the tutor of his child, is not bound to give security for the administration of his estate, the tacit mortgage on the property of the tutor affording, in the eye of the law, a sufficient guaranty for the protection of the interests of the minor. The creditors of the succession, and the heirs of age, being the only persons who could require security from the mother, it results that the security given was exclusively for their benefit. *La-branche v. Trepagnier et al.*, 558.

MORTGAGE.

1. The only effect of a deed of trust or common law mortgage in the countries where they are used, is to establish a lien upon property. A deed of trust has none of the essential requisites of a sale; it conveys no property, is not made in consideration of a price, or of a merely nominal price only, is not necessarily accompanied by a change of possession, and is intended only as a security for the payment of a debt. Under our laws it cannot be held to confer any higher right than that of a mortgage.

2. Where slaves conveyed to a trustee by a deed of trust executed in another State, are subsequently brought into this State, the deed must be recorded here to give it effect as a mortgage against third persons; and where, in such a case, the deed has not been recorded here, and the grantor sells the slaves to a third person ignorant of the deed, the lien will be lost; nor can it be revived against the property in the hands of a vendee of such third person, though he purchased with knowledge of the deed. *Tillman, Trustee, &c., v. Drake*, 16.

3. An act executed in another State in favor of a vendor by one who had purchased a tract of land in this State, which recites that "for the consideration of one dollar, and the further consideration of securing to the vendor the payment of certain notes" executed for the price, he sells and conveys the property to his vendor, the act stipulating that if he should pay the said notes, "then these presents and the estate hereby granted shall become utterly void," &c., duly recorded in the mortgage office of the parish in which the land is situated, will have the effect of a mortgage in this State. C. C. 3257. Nor will the benefit of the mortgage be restricted to the mortgagee; the transferees of the debts intended to be secured are entitled to the benefit of the accessory obligation. C. C. 2615.

4. A mortgage duly registered in the mortgage office of the parish in which the land lies, will not be effected by the subsequent division of the parish, and the establishment of a separate parish embracing the land mortgaged. *Hayden v. Nutt et ux.*, 65.

5. No action can be maintained against a party for aiding a debtor in removing beyond the limits of the State slaves subject to a judicial mortgage in favor of plaintiff, where the evidence shows that the debtor possessed no other property, and that prior mortgages recorded against the debtor exceeded the value of the slaves. *Per Curiam*: The plaintiff has sustained no injury, and can have no action; or if it be conceded that the plaintiff's *jus in re*, resulting from

the general mortgage, is sufficient to authorize the action, the damages must be merely nominal. *Kemp, Tutor v. Nichols*, 174.

6. Article 3298 of the Civil Code, which provides that a mortgage exists, without being recorded, in favor of minors on the property of their tutor, is an exception to the rule laid down in article 3314, that mortgages shall only be allowed to prejudice third persons when they have been properly recorded.

7. *Bona fide* purchasers, without notice, who have paid the price, are not affected by secret equities existing between those under whom they held and third persons, nor by their misrepresentations and frauds. *Pike et al. v. Monget, Tutor*, 227.

8. Where an act of mortgage does not contain the pact *de non alienando*, and the property is in possession of a third person, no judgment can be rendered for its seizure and sale in an action against the mortgagor alone. *Brown v. Routh*, 270.

9. The *paraph* is not essential to the existence of the mortgage; the identity of the note may be established by evidence *aliunde*. The correspondence of date, amount, parties, rate of interest, and maturity, coupled with the possession of the note, raises a presumption of identity, throwing upon the defendant the burden of showing the existence of another note of like description made by himself, the mortgagor referred to in the act of assignment. *Jones v. Elliott*, 303.

10. The reservation of mortgages in favor of the Citizens' Bank by the twenty-fourth section of its charter, applies only to the case of a sale, made without the consent of the Bank, and for a sum insufficient to satisfy their claim. *Alling v. Citizens' Bank et al.*, 308.

11. Where the vendor of a tract of land having one arpent and three-quarters front, received five-sevenths of the price in cash, and, for the balance, took a note of the purchaser, identified with the act of sale by the *paraph* of the notary, the act reciting that, "pour assurer le paiement du dit billet à son échéance, ainsi que de tous frais et intérêts, hypothèque spéciale est réservé seulement sur trois quarts d'arpent du côté d'en haut de la dite propriété, l'acquéreur s'obligeant de ne les point aliéner, ou hypothéquer, au préjudice des présentes," the vendor's privilege not being necessarily inconsistent with this clause, will be considered as retained upon the whole tract; nor can the enforcement of the mortgage, by an order of seizure and sale, operate as an implied renunciation of the privilege.

12. The renunciation of the vendor's privilege must be express; or result by cogent implication. A mere doubt will not suffice

to deprive a party of what the law presumes in his favor.

13. A mortgage and privilege may co-exist on the same thing. They are distinct rights, not exclusive of each other. *Bacchus v. Moreau*, 313.

14. Where a mortgage contains the pact *de non alienando*, one, who subsequently purchases the property from the mortgagor, cannot claim to be in any better condition than his vendor, nor can he plead any exception which the latter could not. Any alienation in violation of the pact *de non alienando* is null, as to the creditor. And where the mortgage contains the pact *de non alienando*, a purchaser from the mortgagor, subsequent to the mortgage, will be considered as standing in the place of the mortgagor, and as subject to the same liabilities. *Stanbrough v. McCall, on re-hearing*, 324.

15. Where a mortgage is not re-inscribed on the books of the register of mortgages within ten years from the date of the first inscription, the inscription will cease to have effect. *Player v. Tarkington, Sheriff, et al.*, 396.

16. Where a debtor, who had executed a mortgage to secure a debt, subsequently executes a mortgage on other property as a further security for the same debt, the last act reciting that the debt for which the original mortgage was given was still due, that the debtor was unable to pay, and that an extension of time had been granted, but without describing the character or site of the property included in the first mortgage, the inscription of the last mortgage will not be equivalent to a re-inscription of the first, which, if not re-inscribed within ten years from the date of the first inscription, will lose its rank. *Per Curiam*: The Code requires the inscription to be renewed in the manner in which it was first made. *Succession of Gremillon*, 411.

18. The proviso in the Statute of 27th March, 1843, amending article 3333 C. C., which declares that that act shall not apply to certain mortgages in favor of the property banks, is not restricted to stock mortgages executed in favor of those banks, nor to those made directly to them, but extends to mortgages which have been acquired by subrogation; and where the subrogation was by authentic act, and recorded where similar contracts are required to be recorded, third persons will be affected by notice without any inscription in the books of the recorder of mortgages. [*On this point, the court being equally divided, the judgment below was affirmed.*]

19. The Statute of 27 March, 1843, was intended to enlarge the effect of the Statute of 11 March, 1842, amending art.

3333 C. C. It does not follow because these Statutes are exceptional, that they should be construed strictly. The construction should be such as will advance the object of the legislature. [*On this point, the court being equally divided, the judgment was affirmed.*]

20. By the Statute of 15th March, 1830, section 11, the legal mortgage on real estate in favor of the State for taxes imposed on it, is limited to two years from the time when such tax became due. *Matter of the New Orleans Improvement and Banking Company*, 471.

21. Where the notes secured by a mortgage have all matured before the sale under an order of seizure and sale, and are of like nature and dignity, they must be paid proportionally out of the fund. *Jacobs v. Calderwood*, 509.

22. Where a purchaser executes a mortgage on the property purchased, in favor of his vendor, to secure the payment of a bill drawn by them on a third person, in favor of their vendor, for the price, the act reciting that a special mortgage is retained on the property in favor of the vendor or any other holder of the bill, but not stipulating that the acceptor of the bill, should have the benefit of the mortgage, on paying the draft without having been put in funds by the drawers, and without being bound as to them to pay it, if the bill be paid by the acceptor at maturity without any subrogation from the creditors at the time of payment, the debt will be extinguished as to third persons and the mortgage cease to operate adversely to other mortgage creditors. *Per Cur*: The debt, as recited in the act of mortgage, was the debt of the acceptor; the draft makes him the principal debtor; and, on paying it, he paid his own debt, which the mortgage was given to secure. The creditor was paid; and as no other object was disclosed in the act of mortgage, and as there is no reservation or qualification contained in it, the mortgage cannot be kept alive for any other ulterior object, or for the benefit of any other person, unless it result from the tenor of the draft itself. *Salaun v. Relf, et al.*, 575.

NEW ORLEANS.

1. A report made by commissioners appointed, on an application to open a street, under the provisions of the Statute of 3d April, 1832, was re-committed with directions to make a new report within a certain delay, but no report was made within the time. Subsequently, after a rule had been taken by a party interested to show cause why

the proceedings should not be dismissed, but before its trial, an amended report was filed, which, on a compromise between the plaintiff in the rule and the petitioners for opening the street, was confirmed and homologated. There was no evidence that the appellant, who was a party, had appeared, or had any knowledge of the proceedings after the re-commitment of the report. *Held*, that no order of extension having been made when the period within which the report was to be returned was about to expire, the appellant cannot be bound by the *ex parte* homologation.

2. The Statute of 3d April, 1832, authorizing a municipal corporation to take the property of a citizen for public use, to be paid for by others supposed to be benefitted thereby, being in derogation of the rights of property, must be strictly construed. *Matter of Exchange Alley*, 4.

3. Under the Statute of 3d April, 1832, regulating the opening and improving of streets and public places in the city of New Orleans and its suburbs, the court before which the proceedings have been instituted can, in no case, amend an assessment made by the commissioners. The report must be approved, or rejected, *in toto*; and in the latter case, the court is bound either to appoint new commissioners, or to refer the whole matter back to the same. *Matter of Claiborne-street*, 7.

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5. The ordinance of the Council of the First Municipality, of 16th February, 1846, imposing a fine on persons selling groceries in certain market-houses of that municipality, is neither illegal nor unconstitutional. *First Municipality v. Devron*, 278.

6. The ordinance of the General Council of the First Municipality of New Orleans, of 28th November, 1843, imposing a tax on all retailers of soda water, with the exception of apothecaries, is not illegal nor unconstitutional; nor will the fact that the party had paid for a license as a confectioner, exempt him from liability for the tax. *First Municipality v. Manuel*, 328.

7. It is no objection to the validity of an ordinance of one of the Municipalities of New Orleans, containing a prohibition and attaching a penalty to its violation, that it purports by its terms to be a resolution.

8. The right to establish markets is a branch of the sovereign power, and that of regulating them is necessarily a power of municipal police.

9. The rigid rules by which the validity of penal Statutes is to be tested, are inapplicable to the by-laws of a municipal corporation.

10. The fines which a municipal corporation is authorized to recover for the violation of its ordinances is a penalty in the nature of liquidated damages, and established, as such, in lieu of the damages which a court would be authorized to assess in place thereof.

11. A by-law, or ordinance of a municipal corporation must be consonant with the law of the land; but it must receive a reasonable construction, and its terms must not be strictly scrutinized for the purpose of making it void. *First Municipality v. Cutting*, 335.

12. Section 10 of the ordinance of the General Council of New Orleans, approved by the mayor, on the 16th December, 1846, establishing a uniform rate of taxes, on hawkers, merchants, &c., does not authorize the imposition on each partner in a banking-house, or firm, making the purchase and sale of bills of exchange its principal business, of the whole amount of the tax, without regard to his residence in the State. The tax is imposed on the business, and not upon the individual members of the firm, unless they are permanent residents, or sojourners within the State. The authority of the General Council to enact that ordinance depends exclusively on the Statute of 12th January, 1842: and the power of the State itself to lay taxes only extends to persons and property within its jurisdiction. *Second Municipality v. Corning et al.*, 407.

13. The proviso of section 7 of the Statute of 20th March, 1840, amending the charter of the city of New Orleans, limiting the privilege conferred by that section to two years, applies only to claims for paving, and not to amounts due for taxes. *Matter of New Orleans Improvement and Banking Company*, 471.

14. Section 2 of the Statute of 10th March, 1845, conferring a privilege on the several parishes of the State for taxes imposed on property in their respective limits, extends to taxes imposed by the General Council of New Orleans. *Same case, application for a re-hearing*, 477.

NEW TRIAL.

See PRACTICE.

NON-SUIT.

See JUDGMENT.

to deprive a party of what the law presumes in his favor.

13. A mortgage and privilege may co-exist on the same thing. They are distinct rights, not exclusive of each other. *Bacchus v. Moreau*, 313.

14. Where a mortgage contains the pact *de non alienando*, one, who subsequently purchases the property from the mortgagor, cannot claim to be in any better condition than his vendor, nor can he plead any exception which the latter could not. Any alienation in violation of the pact *de non alienando* is null, as to the creditor. And where the mortgage contains the pact *de non alienando*, a purchaser from the mortgagor, subsequent to the mortgage, will be considered as standing in the place of the mortgagor, and as subject to the same liabilities. *Stanbrough v. McCall, on re-hearing*, 324.

15. Where a mortgage is not re-inscribed on the books of the register of mortgages within ten years from the date of the first inscription, the inscription will cease to have effect. *Player v. Tarkington, Sheriff, et al.*, 396.

16. Where a debtor, who had executed a mortgage to secure a debt, subsequently executes a mortgage on other property as a further security for the same debt, the last act reciting that the debt for which the original mortgage was given was still due, that the debtor was unable to pay, and that an extension of time had been granted, but without describing the character or site of the property included in the first mortgage, the inscription of the last mortgage will not be equivalent to a re-inscription of the first, which, if not re-inscribed within ten years from the date of the first inscription, will lose its rank. *Per Curiam*: The Code requires the inscription to be renewed in the manner in which it was first made. *Succession of Gremillon*, 411.

18. The proviso in the Statute of 27th March, 1843, amending article 3333 C. C., which declares that that act shall not apply to certain mortgages in favor of the property banks, is not restricted to stock mortgages executed in favor of those banks, nor to those made directly to them, but extends to mortgages which have been acquired by subrogation; and where the subrogation was by authentic act, and recorded where similar contracts are required to be recorded, third persons will be affected by notice without any inscription in the books of the recorder of mortgages. [*On this point, the court being equally divided, the judgment below was affirmed.*]

19. The Statute of 27 March, 1843, was intended to enlarge the effect of the Statute of 11 March, 1842, amending art.

3333 C. C. It does not follow because these Statutes are exceptional, that they should be construed strictly. The construction should be such as will advance the object of the legislature. [*On this point, the court being equally divided, the judgment was affirmed.*]

20. By the Statute of 15th March, 1830, section 11, the legal mortgage on real estate in favor of the State for taxes imposed on it, is limited to two years from the time when such tax became due. *Matter of the New Orleans Improvement and Banking Company*, 471.

21. Where the notes secured by a mortgage have all matured before the sale under an order of seizure and sale, and are of like nature and dignity, they must be paid proportionally out of the fund. *Jacobs v. Calderwood*, 509.

22. Where a purchaser executes a mortgage on the property purchased, in favor of his vendor, to secure the payment of a bill drawn by them on a third person, in favor of their vendor, for the price, the act reciting that a special mortgage is retained on the property in favor of the vendor or any other holder of the bill, but not stipulating that the acceptor of the bill, should have the benefit of the mortgage, on paying the draft without having been put in funds by the drawers, and without being bound as to them to pay it, if the bill be paid by the acceptor at maturity without any subrogation from the creditors at the time of payment, the debt will be extinguished as to third persons and the mortgage cease to operate adversely to other mortgage creditors. *Per Cur*: The debt, as recited in the act of mortgage, was the debt of the acceptor; the draft makes him the principal debtor; and, on paying it, he paid his own debt, which the mortgage was given to secure. The creditor was paid; and as no other object was disclosed in the act of mortgage, and as there is no reservation or qualification contained in it, the mortgage cannot be kept alive for any other ulterior object, or for the benefit of any other person, unless it result from the tenor of the draft itself. *Salauin v. Relf, et al.*, 575.

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NEW TRIAL.

See PRACTICE.

NON-SUIT.

See JUDGMENT.

NOTARY.

Article 3347 C. C. which directs that "every notary before whom an act shall have been made, by which notes to order have been given for the payment of a debt bearing a privilege or mortgage, shall attest each of the notes by putting his name on them, mentioning the date of the act from which the privilege or mortgage is derived, under the penalty of damages." is merely directory to the notary. *Jones v. Elliott*, 303.

NOVATION.

1. Novation can only be established by an express declaration to that effect, or by acts tantamount to such a declaration. The attending circumstances must be weighed with exactness, to ascertain whether the parties have really intended to make a novation and release the original debtor. *Short v. City of New Orleans et al.*, 281.

2. Where a creditor writes at the foot of an account, "Received payment by note," it is a novation of the debt. *White v. McDowell and Husband*, 543.

3. The delegation by which a debtor gives to his creditor another debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared his intention to discharge the debtor by whom the delegation was made. The acceptance by the creditor of such a *stipulation pour autrui* will not authorize the inference that he intended to discharge the original debtor. C. C. 2188. *Jacobs v. Calderwood*, 509.

OBLIGATIONS.

1. A transaction entered into on documents which are subsequently discovered to be false, is null, *in toto*. In such a case it is immaterial to enquire to what extent these false documents may have been the moving or determining cause of the transaction. C. C. 3048. *The Citizens' Bank v. Dennistoun et al.*, 44.

2. Improvements made upon the public lands of the United States, where the party making them is not in a situation to avail himself of the preemption laws, cannot form the object of a contract. Articles 1885, 1886, of the Civil Code, limit the rule contained in article 1960, that no one ought to be permitted to enrich himself at the expense of another, to cases in which the alleged benefit arises from a lawful act. From unlawful acts, though they may have proved beneficial to others, no right not ex-

pressly authorized by law can arise. *Wood et al. v. Lyle*, 145.

3. A memorandum in writing, containing the terms of a transaction, drawn up in the presence of all the parties interested, and signed by two of them who incurred the heaviest obligation under it, and delivered to a mutual friend of the parties for the purpose of being recorded, will be binding without any formal acceptance by parties who, though they did not sign it, afterwards sued to enforce it. *Connolly et al. v. Autenrieth et al.*, 162.

4. A transaction signed by a married woman without the authorization of her husband, if subsequently ratified by her, with the assent of her husband, will be obligatory. *Same case, on re-hearing*, 163.

5. Where one, who had contracted to furnish marble for a building within a time fixed, finds it impossible, in consequence of the inundation of his quarries and marble works, to comply with his contract within the time specified, is permitted by the other party to furnish the materials afterwards, the latter must pay for them.

6. Where one, who had been unable to comply with a contract to furnish materials at a certain time, and who is permitted to furnish them afterwards, claims in his petition the original contract price, but, in a supplemental petition, demands a larger sum on a *quantum meruit*, the amount claimed in the petition will be considered as fixing the price for which the contract was to be performed after the period originally fixed for its performance. *Lagrace et al. v. Fowler*, 243.

7. Where, by the terms of his contract, a debtor is allowed a certain number of years within which to pay the capital of his debt, on condition of paying the interest punctually at fixed periods, it being expressly stipulated that, in case of failure to pay the interest at any one of those periods, the whole of the debt shall become due and exigible; and the debtor, under the pretext of certain sequestrations and attachments levied on the debt in his hands by creditors of the party to whom the debt was due, in which proceedings he had acted either as the counsel or legal surety of the creditors, and thus assisted in creating their interference with the rights of his creditor, refuses to pay the interest falling due at one of the periods fixed by the contract, and is regularly put in default, the whole debt may be exacted from him. *Plympton v. Preston*, 360.

OFFENCES AND QUASI OFFENCES.

See DAMAGES, EX DELICTO.

OFFICE.

The word *office*, in articles 1987 C. C. and 647 C. P., means a *public office*. The commissioners appointed under the Statute of 14th March, 1842, providing for the liquidation of banks, are not public officers. *Conrey v. Copland*, 307.

OPPOSITION OF THIRD PERSONS.

See PRACTICE.

PARAPHERNAL PROPERTY.

See HUSBAND and WIFE.

PARENT AND CHILD.

1. The testimony of witnesses is admissible to prove that a person, alleged to be the mother of a child, presented the child to the priest for baptism and declared herself to be its mother, though the certificates of birth and baptism of the child had been previously offered in evidence, by the same party, to prove the same facts.

2. The acknowledgment of an illegitimate child, which the law requires to be made before a notary, in the presence of two witnesses, when not made in the registry of birth or baptism, is that of the father. Illegitimate children may prove their natural maternal descent, and the acknowledgment of their mother, by any legal evidence. C. C. 221, 230.

3. In an action by the father and sister of a testatrix against her executor, to annul a testament by which an acknowledged natural child was made her universal legatee, letters of the testatrix are inadmissible, where the father had remained unknown, to show that the instituted heir was an adulterous bastard child. Natural paternal descent could not be proved against the heir in such an action. *Per Curiam*: We do not mean to say that the acknowledgment of the mother is an absolute title against her legitimate heirs; but, as she was free, they can only oppose to it that it is false, or made in fraud of their rights.

4. The heirs of the father and mother will not be allowed to prove that a child, acknowledged by a father who was free, was an adulterous bastard on the side of its mother, who had remained unknown. This is equally true, where the mother has acknowledged the illegitimate child, and the father is unknown. *Jobert et al. v. Pilot Executor, &c.*, 305.

PARTITION.

1. The pendency of an action in which one of the joint proprietors of a lot of ground claims from his co-proprietor a sum for improvements, with a privilege upon the lot, cannot prevent the latter from obtaining a partition of the property until the claim is settled. *Per Curiam*: Such a claim is to be taken into account in making the partition, but cannot prevent it. C. C. 1272.

2. It is no objection to a judicial partition that the experts selected to form the lots under article 1289 of the Code, had acted as appraisers when the property was inventoried.

3. A notary is not bound, under article 1290 of the Civil Code, when contestations arise in the course of a partition, to prepare, in all cases, a *procès-verbal* of the objections and declarations of the parties, and to suspend his proceedings and refer the parties to the judge having cognizance of the partition for his decision thereon. He must exercise a sound discretion in ascertaining when they are serious, and, when satisfied that they are not, should disregard them.

4. Where a partition, made by a notary, provides that a party who had drawn one of the lots into which the property was divided, should pay a certain sum to his co-proprietor on account of the greater value of the lot drawn by the former, judgment should be rendered in favor of the latter for the amount, at the time of homologating the report. The party should not be compelled to institute a separate action for the amount. *Jones et al. v. Crocker*, 8.

5. A partition cannot be decreed where one of the co-proprietors has not been represented in the action. *Willey v. Carter*, 56.

6. In a partition of land ordered to be made in kind the notary cannot dispense with the drawing of lots, without an express agreement in writing made by the parties and notified to him. *Moore v. McKiernan*, 226.

7. In an action for a partition of land all the parties in interest must be joined; and it devolves on the plaintiff, on an issue made by one of the defendants, to show that the proper parties are before the court. C. C. 1252. C. P. 1024. *Rightor et al. v. De Lizardi et al.*, 260.

PARTNERSHIP.

1. An act of sale of real estate acquired by a partnership, must be executed by all of the partners. If signed by two only, it will convey only their interest. *Willey v. Carter*, 56.

2. Although in ordinary partnerships each partner is entitled to interest on all sums advanced by him, he cannot claim conventional interest on those sums without an agreement in writing by the other partners to pay it. The circumstance that conventional interest was charged in the books kept by the party who claims it, and in the accounts rendered by him to the plaintiff from time to time, cannot, in partnerships of this kind, be considered proof of such an agreement. *Mourain v. Delamre*, 78.

3. In an action on an obligation in favor of a partnership, all the partners must join to enforce its performance. If one of the partners be absent, he may be represented by a curator *ad hoc*. *Halliman et al. v. Clark et al.*, 179.

4. The mere joint ownership of real estate confers no authority upon either of the joint owners to bind the other by a note.

5. The joint ownership of real estate does not create a partnership as to such real estate. A special contract in writing is necessary for that purpose. C. C. 2807.

6. To enable one of the members of a partnership formed for the cultivation of land held by them as joint owners, to bind the other by a note made in the partnership name, an express authorization, or one clearly to be implied from the course of business of the firm, is necessary. In the absence of such express or implied authority it is incumbent on the payee to prove that the amount of the note inured to the benefit of the partnership.

7. Where one of the members of a partnership formed for the cultivation of land held by them as joint owners, the partnership not being shown to have been such as would convert the land into partnership property, and there being no express authority to either of the partners to bind the other by a note in the partnership name, and none implied from the course of the partnership business, executes a note in the partnership name, with a third person as surety, and discounts it, and applies the proceeds to the payment of a note given for the price of the land by which the joint purchasers bound themselves individually and in *solido*, and the note is paid by the surety, the latter can have no recourse against the partner who did not sign the note. The partner by whom the note was made was bound individually to the party by whom the note was discounted; the application of the proceeds made the party who signed the note a creditor of his co-partner for half the amount so paid, but did not sign it; and when the surety paid the note he became subrogated only to the rights of

the party by whom it was discounted. *Benton v. Roberts et al.*, 216.

8. A confession of judgment, in an action on a partnership debt, made, after the dissolution of the partnership, by one of the members, is binding only on himself. *Herrick v. Conant*, 276.

9. One partner cannot sue his co-partner, to recover the share of the latter in the loss in a particular transaction. He must sue for a settlement of the partnership. *Connolly et al. v. Adams*, 354.

10. Where there has been a settlement of partnership affairs to a certain date, and one partner executes his note in favor of the other for an amount due to the latter, he cannot require a final settlement of the partnership before paying the note thus given. *Copley v. Richardson*, 512.

11. Where a partnership has been dissolved by the death of one of its members, a surviving partner cannot, by acknowledging a claim against the partnership, which had been extinguished by prescription before its dissolution, revive the debt as against the partnership. Such an acknowledgment can only affect the person by whom it was made. *Walsh v. Cane, Administratrix*, 533.

PATENT.

See LAND.

PAYMENT.

Where slaves and other property were conveyed, in another State, by a deed of trust for the benefit of a creditor, and a part only of the property conveyed is accounted for, and the creditor is proved to have in his possession some of the slaves so conveyed, besides having received various sums under the same title, no portion of his claim can be allowed. *Succession of Montgomery*, 420.

PEDLERS AND HAWKERS.

See TAX.

PETITORY ACTION.

See PRACTICE.

PLEADING.

See PRACTICE.

POLICE JURY.

1. The powers vested in police juries and other political corporations must be exercised by ordinances general in their operation.

2. Though the Statute of 28th March, 1840, creating a police jury for that part of the parish of Orleans on the right bank of the river, should be considered as vesting the police jury with power to regulate the proportions, directions and repairs of the levees, and so far repealing the Statute of 7th February, 1829, concerning roads and levees, the last act remains in force and must govern the rights of the reparation proprietors until the powers confirmed by the Statute of 1840 have been legally exercised.

3. The object of section 16 of the Statute of 28th March, 1840, creating a police jury for that part of the parish of Orleans on the right bank of the river, was merely to make the owners of back lots contribute with the front proprietors to the construction and repairs of levees, which afford them all equal protection. It provides at whose expense they shall be made and repaired, but is silent as to the manner of making them, and as to the place whence the necessary materials are to be taken. *De Ben v. Gerard*, 30.

4. It being the duty of the police jury of each parish to provide a sufficient house for the courts and jurors, and a good and sufficient jail to receive and keep prisoners, where buildings have been thus provided by a parish for the State, and are used and occupied for public purposes, they are not liable to seizure and sale under execution against the police jury. *Police Jury of West Baton Rouge v. Michel et al.*, 84.

5. No action will lie against a police jury representing a parish, for the amount of an adjudication, under the Statute of 7th February, 1829, for the construction of a levee in front of land belonging to an absentee, until the plaintiff has exhausted his remedy against the land.

6. Where in an action against a police jury the tax-payers are the parties to be affected, they will not be held to allegations in pleading made in error by their agents. *Brown v. The Police Jury of Madison*, 180.

7. A claim for work done to a public levee, under the provisions of the Statute of 28 April, 1847, relative to the parish of Tensas, may be recovered in an action against the police jury of the parish, unless it be shown that they had provided the specific fund which that act, (s. 5), makes it their duty to raise, and a satisfactory reason be given for their failure to pay the plaintiff

out of it. *Neely v. The Police Jury of Tensas*, 181.

POSSESSORY ACTION.

See PRACTICE.

PRACTICE.

I. *Of the Parties who may Sue or be Sued.*

1. When a principal is domiciled in a foreign country, having an agent here, an action against the former must be instituted before the court of the agent's domicile. *Fuselier, Administrator v. Robin*, 61.

II. *Pleadings.*

2. When the cause of action is not stated in the petition with sufficient precision, and the effect has been to surprise the defendant and prevent her from setting up the proper defence, the case will be remanded, with leave to amend. *Gremillon v. Bonaventure*, 60.

3. Where one who claims to be the owner of a slave found in the possession of a third person, causes him to be placed in jail, and commences a petitory action to recover him, an action for damages for the illegal imprisonment will be prescribed by one year from the termination of the imprisonment. The prescription is not suspended by the pending of the petitory action. The rule *Contra non valentiam*, &c., is inapplicable to such a case, as the damages might have been claimed in re-convention, being connected with and incidental to the action for the recovery of the slave. *C. P. 375. Solomon v. Cavelier*, 136.

4. Pleas in reconvention must be set forth with the same certainty, as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action.

5. Where evidence in support of a reconventional demand has been illegally received, though excepted to on the ground of its inadmissibility on account of the vagueness and uncertainty of the plea in reconvention, the court of the first instance cannot deprive the party of the rights acquired under his bill of exceptions, by offering to grant a new trial if he would make any showing contradictory of the evidence so received. *McMasters v. Palmer*, 381.

6. A plea that certain notes sued upon, having been executed before the bankruptcy of the party, were secured by a deed of trust of real estate, and that plaintiff had re-

ceived payment by purchasing the property and paying for it with the notes, is not inconsistent with a plea by defendant of his discharge as a bankrupt. *Linton et al. v. Stanton*, 401.

7. Where another action is pending before the same tribunal, between the same parties, for the same object, and growing out of the same cause of action, the case must be dismissed, if the exception *litis pendentis* be pleaded. C. C. 335. *Dick v. Gilmer*, 520.

III. Possessory and Petitory Action.

8. A plaintiff in a possessory action, who does not claim either as owner, or with the consent of the owner, must show that he was in actual possession of the land claimed when the eviction complained of occurred. *Dawson v. Headen*, 515.

9. A party who obtained possession of the land in controversy, not as owner, but with the consent and authorization of another, cannot maintain a possessory action against the latter. *Anderson v. Smith et al.*, 525.

IV. Hypothecary Action.

10. In an action to enforce the tacit mortgage of a minor, against real estate held by a third person under a title derived from the tutor, the burden of proving that there is other property first liable for plaintiff's claim is upon such third person. *Alva v. Jamet et al.*, 353.

V. Of Practice Generally.

11. Where a plaintiff, who had bonded a slave seized under a sequestration, was ordered to produce him at the trial for the purpose of identifying him, but, on failing to produce him, "offered to admit any fact which the defendant will state that he could prove by the presence of the slave, and which could not be proved in his absence," the defendant cannot, under such circumstances, be injured by bringing the cause to a hearing on the merits. *Gibson v. White et al.*, 14.

12. Money deposited with a sheriff, under article 3034 of the Civil Code, as security for the release of property provisionally seized, must be restored to the depositor on the dissolution of the seizure. *Medd v. Downing*, 34.

13. At any time before a verdict is rendered the jury may withdraw it, under leave of the court, in order to make it more explicit. *Broussard v. Nolan*, 55.

14. A mandamus will not be granted, to compel a judge of a district court, in the trial of a rule to show cause why a party should not be punished for a contempt, to allow defendant to except to the admission of testimony and to his refusal to permit the evidence to be reduced to writing, nor to compel him to allow an appeal. *Ex parte Powers et al.*, 105.

15. Plaintiff, in an action commenced by attachment, will be entitled to a judgment by default, against an absconding debtor, where a copy of the citation and petition were left with the wife of the defendant at his residence. The appointment of a curator *ad hoc* is unnecessary in such a case. *Thomas v. Wetzler*, 184.

16. An overseer, employed by the year, may obtain a sequestration of the crop on which he has a privilege, on making the affidavit required by law, though the year have not expired for which he was hired and the amount of his salary be not yet due. C. P. 275, § 6. Statute 7th April, 1826, s. 9. It is not essential that the debt should have matured before a party can resort to this conservative measure. *Gardner v. Shipley*, 184.

17. Where a judgment has been obtained here against a debtor, who subsequently died, in another State, leaving residuary legatees, who received their share of his succession, the administration of which in this State had been closed, but who are absentees, plaintiffs cannot proceed against them by appointing a curator *ad hoc* to represent them, and by a rule on them to show cause why execution should not issue against them on the judgment against their testator. The recourse which plaintiffs undertake to exercise being personal and involving matters *en pais*, they must proceed by an action in the ordinary form. *Reynolds et al. v. Horn et al.*, 187.

18. The fact that the petition and citation were not served in the French language, the maternal tongue of the defendant, must be pleaded *in limine litis*. It affords no ground for reversing the judgment on appeal, nor for enjoining its execution. *Ortes et al. v. Lallande et al.*, 188.

19. Where a plaintiff, who had sued to recover a sum from defendant, and filed a supplemental petition praying for the rescission of sales and transfers of property alleged to have been made by defendant in fraud of his creditors, takes a rule on defendant to show cause why the issues presented by the petition and supplemental petition should not be tried separately, and the rule is made absolute, the court will be considered as having exercised its discretion as to the mode of trial best calculated to promote the ends of justice; and when

no injury has resulted to the defendant therefrom, its decision will not be interfered with. *Cunningham v. Erwin*, 198.

20. An intervenor cannot complain of want of notice of an order made in open court, between the original parties. An intervenor is presumed to be always in court, ready to plead. C. P. 391. *Thompson, Executor v. Mylne*, 206.

21. Where a case has been finally decided on its merits by the Supreme Court, and the contest still pending relates merely to the execution of the judgment, it is too late to intervene therein. C. P. 389, 394. *Ib.*, 212.

22. After a plea of prescription by an administrator, in an action against him for a debt due by the succession, it is too late to urge that the suit was prematurely brought, he never having refused to acknowledge the debt. *Bird v. Pate, Administrator*, 225.

23. It is not necessary to serve on the defendant copies of acts or documents annexed to the petition, though the petition itself states that they form part of it. C. P. 175. *Osborn v. Chambers*, 296.

24. A new trial will not be allowed on account of the absence of plaintiff's attorney, caused by the ignorance of the latter of the month in which the term of the court was to be held, where the commencement of the term was fixed by law, and the plaintiff was in the parish in which the court was held and aware of the day on which the term would commence, and might have appeared and asked a continuance, and, if unsuccessful, have employed other counsel.

25. The fact that no return had been made on *ex parte* order of survey, at the time of trial, is no ground for a new trial. It was a matter to be submitted to the discretion of the court on an application for a continuance.

26. The fact of a case being set for trial and tried on the same day, in a district court in the country, will not entitle a party to a new trial. It is a matter to be submitted to the discretion of the court, on an application for a continuance. *Dwight v. Richard*, 240.

27. Where a defendant, who has been personally cited in an action, fails to appear personally or by counsel, and neglects to set up grounds of defence then existing, it is his own *laches*, and he cannot be relieved from its effects. *Niblett v. Scott et al.*, 245.

28. A party cannot controvert the title of one under whom he claims. *Hughey et al. v. Barrow*, 248.

29. Where a plaintiff, in an action on a note given to him in pledge, admits, by a supplemental answer, defendant's right to pay the debt in the notes of a particular

bank, and avers his readiness to receive them, but defendant makes no tender, and answers denying any cause of action against him, and plaintiff, in another supplemental petition subsequently filed, avers that he has become the absolute owner of the notes by purchase at a judicial sale, and withdraws his consent to receive payment in the notes of the bank, defendant cannot require that judgment should be rendered payable in the notes of the bank. *Brown v. Routh*, 270.

30. A third opponent cannot arrest the sale of the property in dispute, nor claim damages against the sheriff for executing the judgment, unless he obtain an injunction, and give security. C. P. 399.

31. Where the principal demand has been tried, no further proceedings can be had on the intervention. The intervenor must be held to have abandoned that remedy. *Jones v. Lawrence*, 279.

32. Where, on an application for a new trial, on the ground of the sickness of one of the plaintiff's counsel and the absence of the other on professional business elsewhere, there is no allegation that the judgment is contrary to law and evidence, nor that justice requires its revision, a new trial must be refused. *Hewlett v. Henderson*, 333.

33. Where a court of the first instance is not required to pronounce on an exception of *lis pendens*, before going to trial on the merits, it will be considered as waived. *Conrey v. Harrison et al.*, 349.

34. In an action for freedom plaintiff was declared to be free, and the case was remanded for further proceedings as between the defendant and warrantor. The warrantor subsequently instituted an action to annul the judgment, on the ground that it was obtained through fraud; but there was no evidence that any further proceedings were had under the decree remanding the case, nor any allegations or proof that the warrantor had refunded the price to the party by whom he was cited. On an exception that the petition presented no grounds sufficient to support an action of nullity: *Held*, that the exception should be sustained. *Miller v. Miller et al.*, 354.

35. The return of a sheriff that he served a copy of the citation and petition on defendant, by leaving them at his domicile in a certain street, in the hands of his wife, a free person, above the age of fourteen, does not show a sufficient service under article 189 C. P. It should have stated the absence of the defendant from home, and that the person with whom the citation was left was living there. *Oakey v. Drummond*, 363.

36. Where the report made by a sworn surveyor, appointed by the court having cognizance of an action of boundary, is de-

fective, and the plan annexed to it is not in conformity with the titles, the report should be rejected, and a new survey ordered. C. C. 837. The surveyor is but an expert, and his operations are always under the control of the court. The defectiveness of the report is no ground for non-suiting the plaintiff. *Union Bank of Louisiana v. Guilloite*, 382.

37. On an application for a new trial, on the ground of newly discovered evidence, it must clearly appear, not only that the discovery has been made since the trial, but that the party "had used every effort and diligence in his power," to procure the necessary testimony previously. C. P. 561. *Linton et al. v. Stanton*, 401.

38. Where there was a want of due diligence on the part of one who applies for a new trial, and the evidence to introduce which it was prayed for was not discovered after the trial, and its character was such that the party was bound to know its materiality before the trial, and the affidavit does not disclose enough to make out a defence, a new trial will not be granted. *Wilson et al. v. Churchman*, 452.

39. Where there is sufficient time between the date and the return day of a citation, the fact that the return day was not during any regular term of the court is immaterial. *Patout, Administratrix v. Rawle*, 485.

40. Where, in an action for slander of title, the petition prays that defendants may be compelled to set forth and establish their titles to the land in dispute, if any they have, and that plaintiff may have judgment for his land, quieting him in his title, and that defendants be prohibited from setting up title to the same, and for damages, the petition cannot be amended by a supplemental answer containing the grounds of a petitory action against the defendants, in which, for the purpose of the action, their possession is conceded.

41. The object of the action of *jactitation* is to protect the ownership of lands from disturbance by slander of the title; but the action has, in no instance, been maintained against a person in possession under a title. The possessory and petitory actions, which are regulated by positive law, give the party injured by the adverse possession every remedy that can be needed. *Copley v. Hasson et al.*, 531.

PRESCRIPTION.

1. The prescription of one year established by article 1989 of the Civil Code, does not apply to an action to have a simu-

lated sale decreed to be such. *Dawson et al. v. Holbert, Tutrix, et al.*, 36.

2. A note not payable to order or bearer, is not prescribed by five years. C. C. 3505. *Graves v. Routh, Administrator*, 126.

3. Where one who claims to be the owner of a slave found in the possession of a third person, causes him to be placed in jail, and commences a petitory action to recover him, an action for damages for the illegal imprisonment will be prescribed by one year from the termination of the imprisonment. The prescription is not suspended by the pending of the petitory action. The rule *Contra non valentem, &c.*, is inapplicable to such a case, as the damages might have been claimed in reconviction, being connected with and incidental to the action for the recovery of the slave. C. P. 375. *Solomon v. Cavalier*, 136.

4. An action to recover immovable property is a real action, and not affected by the prescription of ten years established by article 3508 C. C. Nor does that prescription apply to judgments. *Judson, Administrator v. Connolly*, 169.

5. All acts or hindrances—*voies de fait et empêchemens*, coming from the debtor, which deprive the creditor of the remedy and forms contemplated at the time of the contract, suspend prescription. *Boyle v. Mann*, 170.

6. The prescription of five years, C. C. 3505, does not apply to a note not negotiable. Such a note is prescribed by ten years. C. C. 3508. *Spiller v. Davidson*, 171.

7. Creditors cannot plead a prescription which would not have availed the debtor if pleaded by him. *Bird v. Patz, Administrator*, 225.

8. Where the maker of a note was, before its execution, and until his death, a resident of this State, and his succession was opened, and all of his available property situated here, the fact that the note was dated and payable in another State, will not, in an action on the note against his succession here, make the case an exception to the general rule that the *lex fori* governs prescription.

9. To ascertain whether an instrument is prescribed by our laws, its character must be determined with reference to our own jurisprudence. *Young, State Commissioner, &c., v. Crossgrove, Administrator*, 233.

10. In sales for taxes the assessment stands in lieu of the judgment in ordinary judicial sales, and the party relying on a sale of that description is bound to show its existence and legality. Want of proof of a proper assessment and of a sufficient description of the land, where no actual pos-

session has followed, are not defects that can be cured by the prescription of five years, under the Statute of 10th March, 1834, s. 4.

11. The purchase without warranty, by a third person, of the right, title and interest of a party in a tract of land bought by him at a public sale for taxes, but of which he never had possession, cannot form the basis of prescription. Thesecond purchaser was apprized of the nature of his title, and that it was defective. *Hughey et al. v. Barrow*, 248.

12. Where a note is made payable two years after date, but the maker, on its face, "reserves to himself the right to postpone payment for five years," and the latter makes no tender of payment at the end of two years, nor subsequently, he must be considered as having availed himself of the reservation; and prescription will not begin to run against the payee until the expiration of the term of five years. *Bacchus v. Moreau*, 313.

13. Where an order of seizure and sale, issued for the amount of a note secured by mortgage and containing the pact *de non alienando*, is enjoined by a third person, alleging himself to be the owner of the property mortgaged by a purchase since the date of the mortgage, who, after a judgment rendered against him in the first instance, protracts the litigation by repeated appeals, such third person cannot avail himself of the time which elapsed while the plaintiff was thus judicially restrained from prosecuting his action, as part of the period necessary to extinguish the note by prescription. *Per Curiam*: One who, under the pretence of rights which have been adjudged to be unfounded, unlawfully uses the process of a court to restrain another in the prosecution of a right, cannot avail himself of the delay, which his own wrong has occasioned, to defeat that right.

14. One to whom a note belonging to a succession has been transferred, by the curator, irregularly, and to the detriment of the creditors or heirs of the deceased, will be considered as a trustee for them; but his possession of the note, as holder, will enable him to sue, for the purpose of arresting prescription. *Stanbrough v. McCall*, 322.

15. Where a creditor, whose claim is secured by mortgage, may proceed against the same person by a personal action or by executory proceedings, the institution of proceedings *via executiva* will interrupt the prescription running against the personal action; and this interruption is continuous, preserving the personal action while the executory proceedings are being prosecuted,

and *vice versa*. *Stanbrough v. McCall*, on re-hearing, 322.

16. An administrator, who has been condemned individually to refund to a register of mortgages an amount recovered from the latter by a mortgagee whose mortgage had been illegally erased at the instance of the administrator, the action against the creditors to recover the amount would be prescribed, under article 1176 C. C., by three years from the date of the order or judgment under which the payment was made to them.

17. Interest may be allowed by way of damages. *Landreaux v. Marsoudet*, 334.

18. The administrator of a succession, being an officer appointed by the court for the discharge of certain duties, must be considered always present in court, like a party to proceedings there pending; and no prescription can commence to run in his favor before the homologation of his account. *Courtade v. Chamberlain et al.*, 368.

19. An action against the maker of a promissory note will be prescribed by five years from its maturity, though the maker reside during that time in another State, where the holder was aware of the place of his residence.

20. An endorsement of a partial payment made on a promissory note, where there was no evidence to show in whose writing it was, nor when it was made, will not interrupt prescription. *McMasters v. Mathers*, 418.

21. Where proof of the vacancy of a succession is indispensable to support a plea of prescription, the burden of proving that the succession was vacant rests upon the party pleading the prescription.

22. The institution of an action does not interrupt prescription only while it lasts. Prescription being once interrupted, the previous time can never afterwards be computed to make up the time necessary to prescribe. *Badon v. Bahan*, 467.

23. Prescription as to the original debtor is not interrupted by an hypothecary proceeding against the mortgaged property in the hands of a third person; nor will it be interrupted by a partial payment made through the judicial sale produced by such hypothecary proceedings.

24. A debtor who makes a payment is considered as interrupting the prescription running in his favor, because there is an implied acknowledgment of the creditor's right. But no such acknowledgment can be inferred from a payment made, not by the debtor, but without his knowledge or participation, and through a judicial proceeding to which he was not a party. *Jacobs v. Calderwood*, 509.

25. Compensation for injuries sustained by a purchaser in consequence of defects in

the thing sold, can only be recovered in a redhibitory action, or in an action *quantum minoris*; and in either action the plaintiff must allege and prove a tender of the thing sold. *Fisk v. Proctor*, 562.

PRIVILEGE.

1. Advances made to the captain and owners of a steamer in the home port, to enable him to pay for stores and provisions for the boat, arrears of wages due the crew, and for the expenses due to third persons upon merchandize shipped on the steamer, confer no privilege; the party by whom the advances are made is not legally subrogated to the privileges of the furnishers of provisions and crew. The word *supplies* in the 8th paragraph of article 3204 C. C. applies to materials sold or furnished to the vessel, and not to advances of money.

2. The 7th paragraph of article 3204 applies to sums lent the captain, at a port not the home port, in the absence of the owner, and for the necessities of the vessel, that she may be enabled to complete her voyage.

3. Advances made to the captain and owner of a steamer in a home port, to enable him to pay charges due to other parties on merchandize, in order to procure it as freight for his steamer, are not such advances as are contemplated by paragraph 8 of article 3204 of the Civil Code. *Hyde et al. v. Culver et al.*, 9.

4. Mechanics, laborers, and furnishers of materials employed by one who has contracted for the erection of a building, are only entitled to the same privilege as the contractor, and where the contractor has failed to register his contract as required by law, those employed by him have no privilege. Statute 18th March, 1844, s. 4. C. C. 2743, 2744, 2746, 3239. *Allen, Executrix v. Wills et al.*, 97.

5. A creditor for money loaned to a contractor for the erection of buildings is not within the Statute of 18th March, 1844. No privilege is conferred on such a creditor by that Statute.

6. The Statute of 18th March, 1844, confers on mechanics, laborers, and furnishers of materials a privilege on the amount due by the proprietor, and a privilege on the building. If the contractor has not secured himself a privilege upon the building by recording his contract, he must rank as an ordinary creditor of the proprietor, and the mechanics, &c., cannot be subrogated to a privilege which does not exist; but this does not effect their privilege on what the proprietor owes. *The First Municipality v. Bell et al.*, 121,

7. Where the consignees of a vessel, who had had other transactions with the owner, make advances to the captain, for services and supplies furnished to the vessel, for towage, pilotage, custom-house charges, and furnish him with cash for other purposes not shown, and, though informed by the owner of his intention to sell the vessel, take a bill of exchange on him, drawn by the master at thirty days, for the amount, and permit the vessel to depart, they must be considered as having made the advances solely on the personal credit of the owner, and cannot claim any lien, or tacit hypothecation, for the amount advanced, on the vessel in the hands of the vendee of one who had purchased the vessel while on her voyage to the port to which she was consigned. *Harned v. Churchman et al.*, 310.

8. Where the vendor of a tract of land having one arpent and three-quarters front, received five-sevenths of the price in cash, and, for the balance, took a note of the purchaser, identified with the act of sale by the paraph of the notary, the act reciting that, "pour assurer le paiement du dit billet à son échéance, ainsi que de tous frais et intérêts, hypothèque spéciale est réservé seulement sur trois quarts d'arpent du côté d'en haut de la dite propriété, l'acquéreur s'obligeant de ne les point aliéner, ou hypothéquer, au préjudice des présentes," the vendor's privilege not being necessarily inconsistent with this clause, will be considered as retained upon the whole tract; nor can the enforcement of the mortgage, by an order of seizure and sale, operate as an implied renunciation of the privilege.

9. The renunciation of the vendor's privilege must be express; or result by cogent implication. A mere doubt will not suffice to deprive a party of what the law presumes in his favor.

10. A mortgage and privilege may co-exist on the same thing. They are distinct rights, not exclusive of each other. *Bacchus v. Moreau*, 313.

11. Medical services, rendered after the death of a party to slaves belonging to his succession, are privileged, being for the benefit of the creditors and heirs. *Succession of Gremillon*, 411.

PROCURATION.

See MANDATE.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

PROVISIONAL SEIZURE.

1. A provisional seizure may be dissolved summarily by a rule to show cause, where the apprehensions of the plaintiff, which led to the seizure, are clearly proved to be unfounded. *Salter et al. v. Duggan et al.*, 280.

2. Though a writ of provisional seizure was illegally issued, and the illegality was alleged in the answer, yet, if no application was made to the court below, to quash the proceedings under the writ, and there was no action of the court upon it, the illegality cannot be considered on appeal. *Ledoux et al. v. Smith*, 482.

PUBLIC THINGS.

1. Article 3411 C. C. applies to the abandonment of the possession of moveables only. An abandonment of the title to land must be made in writing. *Hereford v. The Police Jury of West Baton Rouge*, 172.

2. To enable a party to become the owner of a thing which he finds, it is necessary that the former owner should have completely relinquished or abandoned it. C. C. 3384, 3387. *Eastman v. Harris*, 193.

PUBLIC WAYS.

See LEVEES AND ROADS.

RECONVENTION.

See PRACTICE.

RECORDER OF MORTGAGES.

Where a recorder of mortgages, who, on the authority and at the instance of the administrator of a succession, illegally cancelled a mortgage, is compelled by a judgment to pay the amount of the mortgage, with interest and the costs of the suit instituted by the mortgagee, he may recover, against the administrator individually, the amount so paid, with interest from judicial demand, and costs of suit. *Landreaux v. Marsoudet*, 334.

REDHIBITION.

See SALE.

RES-JUDICATA.

See JUDGMENT.

ROADS.

See LEVEES.

1. No judgment can be rendered in favor of a party, declaring him entitled to a right of way over the estate of an adjoining proprietor on the ground of his being cut off from access to the public road or river, without showing, by proof of where the shortest road can be obtained with the least injury to the party required to submit to the servitude, from which of the adjoining proprietors the passage may be legally exacted. It may be that the passage is not due from the party from whom it is claimed, but from another contiguous proprietor. *Adams v. Harrison*, 165.

SALE.

I. *The Form and Validity of the Contract.*

1. Where a third person purchases property at a sale under execution, with money furnished in whole or in part by the insolvent debtor, under an arrangement with the latter that the property shall be held by the purchaser as a trustee for the benefit of a child of the debtor, the title of the debtor will have been divested, but in fraud of his creditors. The transaction will be subject to the prescription of one year, established by article 1989, commencing, not from the date of the sheriff's deed, but from the time when the complaining creditor obtained a judgment against the debtor. *Dawson et al. v. Holbert, Tutrix, et al.*, 36.

2. A verbal agreement for the sale of land or slaves is not null. The defect of such a contract relates only to the proof; and, if one of the parties acknowledges the agreement, or permits parol evidence of it to be given without opposition, it must be carried into effect. *Jacobs v. Davis*, 39.

3. One who purchases, at a sale of the assets of a bank made by commissioners appointed to liquidate its affairs, a note made by an insolvent, will acquire no greater right, against the debtor than the bank had at the time of the sale. *McAuley v. His Creditors*, 52.

II. *Of the Causes of Nullity and Rescission.*

4. Where, under an agreement to sell merchandize, delivery is obtained by fraudulent pretences, the possessor acquires no interest that can enable a creditor of his,

who seizes the property, to hold it against the true owner. *Galbraith et al. v. Davis*, 95.

3. The object of article 2622 C. C. which provides that, "he against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, with interest from its date," is to prevent unnecessary litigation. But where a defendant, instead of paying the price for which the right was transferred, and thereby putting an end to the litigation, continues to contest the suit, opposes the plaintiff's right to recover, and protracts the litigation, he defeats the very object of the law, and cannot avail himself of the provision established in his favor. *Leftwich et al. v. Brown*, 104.

6. An attachment by a creditor of a fraudulent vendee of real estate, not proved to have had notice of the nature of the vendee's title, levied on the property while in the possession of his debtor, will hold the property against creditors of the fraudulent vendor. *Stockton v. Craddick*, 282.

7. If there be anything unusual or irregular in a sale of property made by a party in possession but without authority to sell, the title of the real owner will not be affected by it, any more than it would be if the purchaser were not in good faith. *McGregor et al. v. Ball*, 289.

8. Simulation, as between the parties to an authentic act, cannot be proved by parol. *Gauthier v. Briault*, 487.

III. Of Delivery.

9. No recovery can be had in an action for the price of plaintiff's interest in a tract of land without proof of delivery of possession, where the price was payable only after delivery of possession, and such delivery was alleged in the petition. *Wilson v. Phillips*, 158.

10. The acknowledgment by the purchaser, in an act of sale of real estate, of possession of the land sold, refers exclusively to the possession which the vendor had. If a third person were in possession at the time, and the vendor conceals that fact from the purchaser, he is guilty of a fraud, which will entitle the purchaser to relief, notwithstanding his acknowledgment.

11. That the law (C. C. 2455) considers the delivery of immovable property as always accompanying the public act which transfers it, is true, so far as the vendor is concerned, and every obstacle afterwards interposed by him to prevent the corporeal possession of the purchaser is a trespass; but this does not release him from the obligation of actual delivery of the thing sold,

when in possession of another at the time of the sale.

12. The vendor of a lot of ground who was aware, at the time of the sale, that a part of the lot was claimed by, and in possession of, a third person, though he subsequently offers to take back the property, refund the price, and pay for the improvements, has no claim against the purchaser before delivering the entire thing sold. C. C. 2450. The latter is not bound to accept his offer to take back the property, and refund the price, and pay for the improvements. *Flynn v. Moore*, 400.

13. Without an assignment, or proof of actual delivery, the possession of the receipts given by a receiver of public moneys, for the price of public lands, will give the holder no better title to them than he would have to a promissory note payable to the order of the purchaser of the lands, held by him without endorsement or proof of transfer and delivery. Article 2612 C. C. supposes that when the title is not transferable by delivery, and does not bear upon its face evidence of the lawful possession of the holder, proof of the delivery must be made. *Terry v. Hennan*, 458.

IV. Warranty.

14. One who purchases land, assuming to pay, as part of the price, a balance due by his vendor to the original owner who purchased with full knowledge of the existence of a servitude on the property, cannot withhold any part of the amount assumed, on the ground of a concealment by his immediate vendor of the existence of the servitude. There is no privity between the original vendor and the last purchaser; the latter must look to his immediate vendor. *Lejeune v. Hebert*, 59.

15. Where one who had purchased real estate in a State in which the common law prevails, with full warranty, is evicted in an action of ejectment instituted by a third person, and, without contesting the claim of the latter in the court of the last resort, purchases his claim before delivery of the premises by the sheriff to such third person, his recourse against his warrantors will not be thereby affected. The submission to the judgment by an attornment was no waiver of the right to prosecute the writ of error; the rule that the voluntary execution of a judgment or decree is a waiver of, or bar to, an appeal or writ of error, has no place in the common law. Nor was the purchase from the plaintiff in ejectment a release at law of the errors in the judgment, nor could it be pleaded in bar of a writ of error prosecuted for the exclusive benefit of the purchaser.

16. By the common law one judgment in ejectment is no bar to another, and not being a decision on the mere right does not prejudice the proprietor in his assertion of it in a higher degree of action.

17. To recover against a vendor of real estate on his covenant of warranty, under the laws of Mississippi, the purchaser who has been evicted by a judgment, in the absence of notice to the vendor of the former suit, must show that the recovery was by a title paramount to that conveyed to him.

18. Where a purchaser of land is evicted by a third person under a judgment in an action of ejectment, if his vendor defended the action himself or by an agent authorized to represent him in the matter, or if he had sufficient notice of the institution of the action so that he might have defended it, his covenant of warranty, by the law of Mississippi, is broken; otherwise the judgment will not be binding on him.

19. In an action against a vendor of real estate situated in another State on a covenant of warranty in the act of sale executed here, founded on an eviction by a third person under a judgment rendered in that State, the notice of the institution of the action by such third person required to be given to the vendor in order to render the judgment conclusive as to the breach of warranty, must be such as the laws of that State require, and not such as would be necessary under our law had the land and action been in this State. The provisions of articles 2493, 2494, C. C., which bind the vendor by a judgment of eviction against the purchaser even in the absence of a notification of the suit, unless the vendor show that he possessed proofs which would have sustained his title, and which, for want of such notice to him, have not been made available, does not apply to such a case. *Kling v. Sejour et ux.*, 128.

V. Redhibition and Action Quanti Minoris.

21. Where part of a flock of sheep, purchased at a succession sale, die within three days thereafter of a disease proved to have been incurable, the vendor must bear the loss. C. C, 2508. In such a case the sale cannot be rescinded, but the price of the sheep which have died should be deducted from the price of the flock. *Michoud et al., Executors, v. Marquet et al.*, 51.

22. Where a slave sold on the 5th, was found to be seriously ill of a typhus fever on the 7th of the month, of which he died on the next day, the disease will be presumed to have existed at the time of the

sale, in the absence of evidence that, though subsequently developed, it did not exist at that time. C. C. 2508. *Landry v. Peterson et al.*, 96.

23. The clause of art. 3508 C. C. which provides that "if the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale," does not apply to vices of character. *Anderson v. Dacosta*, 136.

24. Proof that plaintiff's attorney offered to defendant to rescind the sale of a slave on receiving back the price, and that the offer was rejected by defendant, who said that a law suit was unavoidable, will dispense with the necessity of a tender of the slave before suing to rescind the sale. *Nott et ux., v. Marchesseau*, 344.

25. Proof of the existence of disease in a slave before the sale, and of his death, from that disease within three weeks after the sale, raises a very strong probability that the disease was incurable at the date of the sale; and very clear and cogent proof should be required from the vendor to overthrow the presumption.

26. Art. 2518 C. C. which declares that "the redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were matched, as a pair of horses or a yoke of oxen," is inapplicable to the case of a family of slaves, consisting of a father and mother, sold as field hands, and their infant child. *Per Cur*: The right to a total rescission only arises, when the things sold are so dependent on each other for their usefulness, that the loss or unsoundness of one would render those remaining comparatively valueless. and where their natural dependence and peculiar fitness relatively to each other in a particular service was the principal motive of the purchase. That the two examples given in art. 2518 are mere illustrations of the rule, and that the principle may be extended to other things, is conceded; but the things must be *matched*, in the sense in which that term is used in the Code. *Bertrand v. Arcueil*, 430.

VI. Transfer of Debts.

27. Notice to a person, before his appointment as agent, will not be binding on the principal.

28. The Code, while it requires notice to a debtor of the transfer of a debt, has not prescribed any particular form in which it must be given. C. C. 2613. Nor will any misdescription, even as to the amount of the debt, vitiate the notice, where, from the rest of the description and the circum-

stances of the case, the error could not have misled the party notified. *Plympton v. Preston et al.*, 356.

VII. Judicial and Forced Sales.

29. Whatever effect the want of appraisal may have on a sale of moveable property under execution between the parties to the sale, third persons cannot consider such a sale as null on that account. *Chapman, Assignee, v. The N. O. Gas Light Co. et al.*, 153.

30. A sale under execution of "all the rights, claims, demands and interest which the heirs of A. have upon their mother and natural tutrix, on account of their inheritance from &c.," is void for vagueness and insufficiency in the description of the thing sold. The nature of the rights, interest, claims and demands should have been so stated as to give bidders a clue to their value. Art. 647 C. P. does not dispense with a proper description of the rights and credits seized. *Gales v. Christy, Assignee*, 293.

31. An agreement made by the sheriff with a purchaser, subsequently to the adjudication at a judicial sale, that the price should remain in the hands of the sheriff until a good and satisfactory title was given, and, in default thereof, that he would return it, can invalidate the adjudication. *Bacchus v. Moreau*, 313.

32. A judicial sale of all the right, title and interest of a creditor in any further dividend that may be declared among the creditors of an insolvent, is a sale of the debt due to the creditor (C. P. 690, 694); and where the debt was due by a bill or note, which was never in the actual possession of the sheriff, the seizure is invalid, the sale null, and the purchaser may recover back the price paid by him. *Gaines v. Merchants' Bank*, 369.

24. A party seeking to recover back, on the ground of the nullity of the sale, money paid to a judgment creditor as the price of property sold under execution, must pursue the course pointed out by art. 711 C. P., and make the judgment debtor a party to the action; and the judgment obtained against him and the creditor jointly must provide that execution shall be first taken out against the debtor, but, on its being returned unsatisfied, that execution may be issued against the creditor. *Per Curiam*: Art. 711 C. P. relates to the eviction of the purchaser from the thing purchased by him; but it is declaratory of a principle relating to cases where the sale is virtually defeated from other causes. *Gaines v. Merchants' Bank*, 369.

VIII. Sales at Auction.

35. The remedy by a sale *à la folle enchère* is a severe one, and must be confined to cases coming clearly within the provisions of the law.

36. Art. 2590 of the Civil Code contemplates the terms of the sale *à la folle enchère* shall be the same as those of the first adjudication; and where an auction sale was made for a price payable partly in cash and the balance on credit, but, on a re-sale *à la folle enchère*, the property was offered and sold for cash only, the difference between the price of the first and second sale will not be considered a just measure of the injury sustained in consequence of the first purchaser's failure to comply with his contract; nor will it make any difference that the change was attributable to delays produced by the failure of the first purchaser, during which the note, which was to have been assumed for the credit part of the price, matured. *Guillotte v. Jennings*, 242.

IX. Of Sales generally.

37. The last purchaser is protected by the good faith of his vendor. *Tillman, Trustee &c. v. Drake*, 16.

38. Where a party sold to plaintiff a tract of land acquired from a third person, supposed to contain a certain quantity, and plaintiff afterward re-sold, by public act, to his vendor a certain number of acres of this land, and the latter sold that quantity to defendant, and it is subsequently ascertained that the tract originally sold to plaintiff did not contain the quantity it was supposed to do, plaintiff cannot hold all the land that he would be entitled to, if there had been no deficiency. Whatever secret equities may exist between plaintiff and his vendor, the former cannot claim the benefit of them against a subsequent purchaser in good faith. Having placed on the public records the title on the faith of which defendant purchased, he must bear the consequences of having presented the rights of his vendor in a false aspect. *Boudreau v. Bergeron*, 83.

39. Where a proprietor who had divided a part of a tract of land into lots, leaving a space between those nearest the river and the public road, as well as the batture, and the remainder of the tract in the rear beyond the lots, undivided and vacant, sells the lots in conformity with a prospectus which recites that "the portion of the front, of the batture, of the pasture, and of the cypress swamp corresponding with the lots offered for sale, is abandoned in perpetuity in favor of the purchasers, to be by them en-

joyed in common, with this sole condition that the said purchasers shall not send in the common pasture but three head of animals for each lot, and shall cut wood in the swamp for their private use only, and not for sale," the interest of the purchasers in the front, batture, pasture and cypress swamp, is not a mere right of use, or usufruct, but the vendor will be considered as having completely divested himself of all right to the property, the term *abandonment* excluding any reservation as to the title as positively as the term *perpetuity* excludes any limitation of time. The conditions as to the use of the pasture land and wood, is intended merely to regulate the use among the purchasers, and does not conflict with, but is in furtherance of, the avowed objects of the sale.

40. If the terms used would, in a testament or donation, transfer the property, they will have the same effect in a contract of sale. *Arnauld et al. v. Delachaise*, 109.

41. By the law of Kentucky where, under an absolute bill of sale of a slave, possession remains in the vendor, such possession is not merely *prima facie* evidence of fraud, but renders the sale fraudulent *per se*, and inoperative against creditors of the vendor who had no notice at the time of trusting the seller. But when possession is taken by the vendee before third persons have acquired any rights, the fact of the anterior continued possession would not be regarded as anything more than a suspicious circumstance, to be considered in appreciating the subsequent conduct of the parties. And, supposing the sale to have been real and in good faith, where the vendee, some time after the sale, takes possession of the property and holds it for several months, the reacquisition of possession by the vendor under a lease would not subject the property, in Kentucky, to the pursuit of creditors of the vendor who became such after the lease; nor would the purchaser lose his rights, as against the creditors of the lessee, by permitting the lessee to bring the property into this State, although the possession and declaration of the lessee, that he was owner, may have induced them to trust him. *Brown v. Glathary*, 124.

42. One who purchases from the government a certain number of acres of public land on which there was at the time wood cut and corded, has no claim to the wood, which had been separated from the land and was movable at the date of the purchase. The rights of the government were not transferred to the purchaser. C. C. 454, 456, 457, 459. *Woodruff et al. v. Roberts et al.*, 127.

43. *Bona fide* purchasers, without notice, who have paid the price, are not affected by secret equities existing between those under whom they hold and third persons, nor by their misrepresentations and frauds.

44. Third persons acquiring rights in good faith, under a judgment, have nothing to look to beyond the judgment and proceedings under it. If the minor be injured by the misrepresentations of the tutor, the remedy is against him, and the surety on his bond. *Pike et al. v. Monget, Tutor*, 227.

45. A purchaser at a probate sale, of lands held by the deceased under an act of sale from an assignee of the receipts given by the receiver of public moneys for the original price of the land made *sous seing privé* and never registered, who has been for several years in actual notorious possession under a recorded title, cannot be affected by one claiming under a subsequent purchase of the land from the party by whom the price was paid to the government, and to whom the patent had been issued. The last purchaser, being the assignee of the party by whom the receipts had been previously assigned, cannot take advantage of the defect of registry and is bound by the act *sous seing privé*. C. C. 2417, 3522, §5. *Per Curiam*: A purchaser will be charged with notice who buys, in the face of a notorious adverse possession, under a recorded title, for several years, from one who holds merely the legal title—the patent, which inures to the benefit of the equitable owner, without possession or apparent ownership. *McGill v. McGill*, 262.

46. Art. 2428 C. C., which declares that property claimed in an action cannot be alienated, pending an action, to the prejudice of the plaintiff, does not apply to one who purchases real estate pending an action against the owner to recover a balance alleged to be due by him as tutor, the action being not for the land itself but for a sum of money. And one who claims to exercise a mortgage on the property for the debt so ascertained to be due to the minors, must produce other evidence than the judgment to establish the debt, the judgment being as to the purchaser *res inter alios*. *Gales v. Christy, Assignee*, 293.

47. Every one, not prohibited by law, may buy or sell. *Plympton v. Preston et al.*, 356.

SEQUESTRATION.

1. An overseer, employed by the year, may obtain a sequestration of the crop on which he has a privilege, on making the affidavit required by law, though the year have

not expired for which he was hired and the amount of his salary be not yet due. C. P. 275, § 6. Statute 7 April, 1826, s. 9. It is not essential that the debt should have matured before a party can resort to this conservative measure. *Gardner v. Shipley*, 184.

2. A return on a *fi. fa.* that, it was impossible to make a demand upon the defendant personally and that no property of his could be found, will authorize the plaintiff to proceed against the surety on a bond given to release property which had been sequestered.

3. Where a sheriff inserts in a sequestration bond a condition not required by law, the condition will not be binding on the surety. The bond must be construed with reference to the law under which it was taken.

4. The legal intent of a sequestration bond being, under arts. 279, 280 C. P., to secure the delivery of the property to be applied towards the satisfaction of the plaintiff's claim when adjudged, and the penalty of the bond being inserted to secure the performance of that act, the injury sustained by the plaintiff, on a breach of the condition, will be the value of the property sequestered, which, had it been produced, would have been applied to the payment of his claim; but the mere amount of that claim, without reference to the value of the property sequestered, is not the measure of the injury sustained, nor of the liability of the sureties in the sequestration bond. *Barker et al. v. Morrison et al.*, 372.

5. Where a writ of sequestration has been improperly issued, it cannot be aided by proof adduced at the trial on the merits, nor by admissions of fact contained in the subsequent pleadings, the observance of the requisites prescribed by law being in the nature of a condition precedent.

6. An affidavit for a sequestration, which states that the defendant is indebted to the plaintiff "in about the sum of \$4950," and that the "deponent verily believes the defendant will dispose of the property, or send it out of the jurisdiction of this court," not stating any specific sum as being due, nor the apprehensions of the party that the property will be removed during the pendency of the suit, is insufficient. *Per Curiam*: The word "during the pendency of the suit" may not be sacramental; but the necessity of the conservative process should substantially appear. Sequestrations, and other conservative remedies, by which the property of a party is wrested from his possession and taken into the custody of the law, before judgment, without notice, and upon the *ex parte* showing of the plaintiff, are extraordinary and rigorous, and hence

the doctrine has been uniform that they are to be strictly construed, and that the requisites of the law must be observed upon pain of nullity. *Wilson et al. v. Churchman*, 452.

7. A third person, in actual possession of movables, under a *bona fide* purchase from the owner, before the issuing of a sequestration against the property at a suit of a creditor of the vendor, is entitled to hold possession, under bond, until the final hearing of the case. And where the purchaser was not made a party to the action against his vendor, he will not be precluded, under the statute of 5 March, 1842, from bonding in preference to the plaintiff, on the ground of his having permitted ten judicial days to elapse after the serving of the sequestration without exercising the the right of bonding. *Claiborne v. Bauries*, 567.

SHERIFF.

1. Where a debtor, in embarrassed circumstances, sells the contents of his shop to a third person, but remains in the shop acting as a salesman, and the purchaser, for his own advantage in business, retains the name of the former owner over the door, and the boxes and packages in the shop are marked with the name or the initials of the former owner, and, on an attempt by a sheriff to seize the goods as the property of the debtor, he and the purchaser inform the sheriff that they had been sold, but the purchaser does not exhibit his bill of sale, nor his books, offering nothing but his naked assertion to establish the sale, and the officer seizes and takes away the goods, but, on the trial of an action instituted against him by the purchaser for damages, brings the property into court, and offers to deliver it up if the court so direct, judgment will be rendered against the officer, though the court be satisfied of the *bona fides* of the sale, only for the restoration of the property, and for any damage it may have sustained from want of proper care while in the hands of the sheriff, and for costs. *Per Curiam*: The purchaser held out the vendor in a false light, to the public, and was bound to give the officer something more than his mere naked assertion as proof of sale. Nor are we prepared to say that there was such a legal change of possession as would perfect the sale against creditors, supposing it to have been real and *bona fide*. *McDonald v. Lewis, Sheriff*, 201.

2. A sheriff cannot recover under stat. 10 March, 1845, any compensation for the custody of slaves seized under an order of seizure and sale, when he never had any actual possession of the slaves—never ap-

pointed a keeper to them, nor was ever subjected to any expense or trouble for their safe keeping, or exercised any supervision over them. *Ledoux et al. v. Rucker*, 218.

3. Where a rule has been made absolute against a sheriff, in consequence of the insufficiency of the surety on a bond given for the release of property attached, adjudging him to be bound to the plaintiff in the same manner as the surety was bound, an action will lie against him on the return of a *fi. fa.* against the principal unsatisfied. *Crane v. Lewis, Sheriff*, 320.

4. The law makes it the duty of the sheriff to call upon the defendant to point out property, and, in case he is unsuccessful, to call upon the plaintiff to do the same thing. Here no such request was made from either, and, *non constat*, that the judgment would not have been paid if a demand had been made of the defendant. *Copley v. Richardson*, 512.

SHIP AND SHIPPING

See COMMON CARRIER.

SLAVES.

1. In an action against the master to recover the value of a slave belonging to plaintiff killed by a slave of defendant, proof that the slave had been convicted of the killing and had been sentenced to imprisonment at hard labor for life, and that a certain sum had been paid for him by the State to defendant, will not relieve the defendant from liability for his offence. The slave having ceased to belong to defendant, he cannot make an abandonment of him; but as the slave is represented by the sum received from the State, he may exonerate himself by paying over that amount. *Arnoult v. Deschappelles*, 41.

2. The provisions of section 32 of the Statute of 7th June, 1806, relative to the police of slaves, must be strictly construed, and the authority it confers upon a *freeholder* cannot be extended to any other person, and where one not a freeholder, in attempting to exercise the authority conferred by that section, shoots and injures a slaves, he will be responsible to his master in damages for any permanent diminution of the value of the slave, for the loss of his labor, and the expense of surgical treatment. *Blanchard v. Dixon*, 57.

3. One with whom slaves, belonging to a succession opened in another State, were deposited for safe keeping in that State, by whose laws they are personal property, and from whose possession they have been frau-

dulently and forcibly taken, and brought to this State and sold, has such a qualified property in them as will enable him to maintain an action for their possession against the purchaser; but he cannot recover the value of their hire while in possession of the defendant; for that he is answerable to the succession to which they belonged. *Johnsen et al. v. Imboden*, 178.

4. Article 107 of the Constitution which guaranties to every person accused a speedy public trial by an impartial jury of the vicinage, does not apply to slaves.

5. Slaves are treated as persons by the criminal law.

6. A slave may be punished for the murder of another slave, under section 11 of the Statute of 7th June, 1806, relating to slaves; or under ss. 1, 2, of the Statute of 7th June, 1806, on the subject of crimes and misdemeanors, nothing in this last act confining it to free persons.

7. Any objections to a tribunal organized under the Statute of 1st June, 1846, for the trial of a slave, on the ground that it does not appear that the slave owners who sat on the trial were selected by the justice of the peace, nor by either of them, nor that persons who sat on the trial as slave owners, were slave holders of the parish, must be urged before the persons who sat on the trial are sworn, or they will be considered to have been waived. *State v. Dick*, 182.

8. After conviction it is useless to enquire by what authority the accused was arrested.

9. The provision of section 13 of the Statute of 1st June, 1846, directing that an affidavit be made before the arrest of a slave, is intended for the protection of his owner, who cannot be required to surrender his slave until facts shall have been sworn to authorizing a prosecution. The neglect of the master to insist on this right, is not an irregularity of which the slave can complain.

10. The Statute imposing on the district attorneys the duty of prosecuting slaves accused of capital crimes, does not render their presence necessary to the validity of such proceedings. All the courts of the State are empowered to appoint counsel to prosecute on behalf of the State, in the event of the absence of the district attorney. Statute of 28th January, 1817, s. 20.

11. An objection that a second justice of the peace was not present to aid in selecting the ten owners of slaves for the trial of a slave under the Statute of 1st June, 1846, must be made before the persons selected are sworn. If they are permitted to be sworn, without objection, it will be a waiver of the irregularity.

12. Where one accused of a crime is prosecuted as a slave, and he submit to a trial without objection, the fact of his being a slave will be considered so far admitted as to exempt the State from proving the slavery.

13. The Statute of 1st June, 1846, providing for the trial of slaves, does not require that the sentence should be signed by both justices of the peace. The signature of one is sufficient. *State v. Jerry*, 190.

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SUBSTITUTION.

See DONATIONS.

SUCCESSIONS.

I. Appointment of Administrators, Curators, and Executors.

1. The widow, who is tutrix of the minor heirs, is entitled to the administration of the succession of her husband, in preference to a person not shown to have been a creditor, though the application of the former was not made until more than ten days had elapsed from the advertisement of the first application. C. C. 1035, 1037. Articles 1111 of the Civil Code, and 970 of the Code of Practice, requiring oppositions to applications for letters of administration to be filed within ten days after the publication of notice, relate to the appointment of curators of vacant successions; and cannot be considered as controlling the order of preference established for the appointment of administrators. *Succession of McKinney*, 25.

2. A woman cannot be legally appointed administratrix of the succession of her brother. It is an office which a woman is incapable of exercising. C. C. 25.

8. A woman appointed administratrix of a succession, the duties of which she is incapable by law of exercising, can be made to account only for the property that has come into her hands. *Cason et al. v. Cabrera, Administratrix*, 538.

4. An administrator's bond found in its proper place among the papers of the succession, though not marked filed, must be presumed, in the absence of other evidence, to have been acted upon by the judge in authorizing the administrator to take possession, and by the creditors in acquiescing in the appointment. *Canal and Banking Company v. Brown*, 545.

II. The Administration of Successions.

5. Though a party have no authority to receive the funds of a succession or to pay its debts, yet if the funds of the succession have been applied by him as the law would have applied them, the heir will be bound by such payments, and he will be entitled to credit for their amount in a settlement with the heirs.

6. A receipt *sous seing privé* given to an administrator on the payment of an account, is not evidence that the account was due, if the fact of its being due be disputed. *Moore et al. v. Thibodeaux*, 74.

7. Technical objections opposed to investigations into the conduct of administrators are entitled to little favor. *McComas, Tutorix v. Ronquillo, Administrator*, 123.

8. Claims of creditors which have been presented to the administrator but have not been admitted to be due, and which have not been prosecuted by suit, afford no ground for withholding from the heir money in the hands of the administrator (Statute of 25th March, 1828, § 16); nor are such creditors entitled to notice of the demand of the heir to be put in possession. *Graves v. Routh, Administrator*, 126.

9. The administrator of an insolvent succession represents the creditors, and not the deceased; and he may maintain an action for the benefit of the creditors, which the deceased, were he alive, could not do for his own advantage. *Judson, Administrator v. Connolly*, 169.

10. One to whom a note belonging to a succession, has been transferred, by the curator, irregularly, and to the detriment of the creditors or heirs of the deceased, will be considered as a trustee for them; but his possession of the note, as holder, will enable him to sue, for the purpose of arresting prescription. *Standbrough v. McCall*, 322.

11. The administrator of a succession, being an officer appointed by the court for the discharge of certain duties, must be considered always present in court, like a party to proceedings there pending; and no prescription can commence to run in his favor before the homologation of his account. *Courtade v. Chamberlain et al.*, 368.

12. Where there are different administrators of a succession, succeeding each other, each administrator will be entitled to commissions on such portions of the estate as have been administered by him.

13. The fact that some time after the opening of a succession, a large portion of the property included in the inventory and apparently belonging to it, was claimed by the heirs of another person, and, after a protracted litigation, adjudged to belong to

them, will not deprive the executors, who had, for several years, administered the property, by providing tenants, collecting rents, paying taxes, and making the repairs necessary for its preservation, of the right to charge the usual commissions upon the property. *Per Curiam*: It would be unjust to permit the real owners of the property to enrich themselves at the expense of the executors. If this equitable view be correct, it is immaterial whether they be considered as strictly clothed with seizin of the entire estate or not—whether the compensation be granted as commissions, *eo nomine*, in the technical sense of the code, or as a just remuneration for services which have ensured to the benefit of the parties who have recovered the property.

14. Decision in *Succession of Mylne*, 1 Rob. 400, as to the allowance of commissions to an executor on unproductive property of the succession, affirmed.

15. The reason of the rule refusing the allowance of commissions to an executor on unproductive property of the succession is, that its administration gives them little or no trouble. Thus the mere payment of the taxes on uncultivated lands, will not authorize the allowance of a commission on their value. But there are cases in which commissions should be allowed on such property; as where a suit had been instituted to evict the executor, and he defends it successfully, thus saving its value to the succession; or where the proper public authorities require the erection of a levee to protect the uncultivated lands from inundation, which would impair their value, while that value would, on the other hand, be enhanced, in a greater ratio than the expenditure, by its construction.

16. Where a tract of land, fronting a bayou, opposite to a sugar plantation, has been used to supply timber and fuel for the purposes of the plantation, it cannot be regarded as waste and unproductive land, on the value of which the executors cannot charge a commission. *Succession of Girard*, 386.

17. The homologation of a tableau of distribution presented by the widow and administratrix of the succession of a deceased husband, recognizing a mortgage of a third person upon certain slaves belonging to the succession, and ordering its payment, is conclusive against her right subsequently to claim a legal mortgage on the same property to the exclusion of such third person.

18. Where no neglect or maladministration is alleged, and there is no prayer that the administratrix be held liable beyond the fund acknowledged or shown to be in her hands, the mere fact that the assets in her hands, at the time of the homologation of

the first tableau of distribution, and which were ordered to be applied to the payment of a mortgage claim, were sufficient at that time to pay it, will not authorize, in an opposition by the mortgage creditor to the second tableau, a judgment against the administratrix, individually, for the amount of the claim, with the interest accrued since the homologation of the first tableau.

19. Money paid by an administratrix to a creditor of a succession, out of the proceeds of property subject to a previous mortgage, cannot be recovered back by the administratrix, where, at the time of the payment, there were funds in her hands proceeding from the sale of the mortgaged property sufficient to extinguish it, though, by the *laches* of the administratrix in suffering the mortgage claim to remain unpaid and from the accumulation of interest, the fund has become insufficient to extinguish it. She cannot avail herself of her own *laches* to recover money lawfully paid. *Succession of Foster*, 479.

20. No action can be instituted against the surety on an administrator's bond, until the necessary steps have been taken to enforce payment from the principal. Statute 16th March, 1842, sec. 6.

21. Where a judgment has been rendered in an action against an administrator, removing him from office and ordering him to render an account, the institution of an action, by the heirs, against him on his bond for the amount of their inheritance, is not inconsistent with the previous action; but proceedings should be suspended until the administrator has rendered the account ordered in the first action, or until the delay allowed to him for that purpose has expired. The settlement of the account ordered would form the basis of a judgment in the second action. But where, in such a case, the plaintiff proceeds to trial, his action must be dismissed. *Kemper et al. v. Splane et al.*, 486.

22. The appointment of an administrator, regularly made, will not be rendered void by the subsequent discovery of a testament; nor does the authority of the administrator cease from the moment of the probate and order of execution of the will. His capacity to prosecute an existing suit will not cease, even after the executor named in the will has been duly qualified, where the latter, after praying for an inventory, takes no further steps in the administration, and does nothing whatever to indicate that he takes any interest in the prosecution of an action in which the interests of the succession are seriously involved.

23. The capacity to exercise the office of administrator, does not cease, *ipso facto*, by the bankruptcy of the individual. It may

be a ground for his removal; but, of itself, does not impair his official authority. *Dwight, Syndic, v. Simon et al.*, 490.

24. Where a surviving spouse, who had qualified as the natural tutrix of her minor children, causes herself to be appointed, under article 1037 C. C., administratrix of her husband's succession, there being an heir of age at the opening of the succession, and creditors, and on the day of her appointment executes a bond, with surety, for her faithful administration, in a sum fixed by the judge in virtue of the discretion reposed in him by article 1037, binding herself faithfully to account over to the heirs, or to any other person having a right to receive the amounts of the succession. The amount of the bond being less than half the amount required in case of an appointment under article 1041 C. C., the bond must be considered as executed only with a view to protect the interests of the creditors who had made themselves known, and of the heirs of age, who may have been satisfied with the security which a bond of that amount offered. The surety in such a bond cannot be made liable to the minor heirs for any amount due to them from their father's succession, received and not accounted for by their mother. *Labranche v. Trepagnier et al.*, 558.

25. A sale of the movables of a succession made by an administrator, under an order of court for the payment of debts, though far less than their appraised value, will not render the administrator liable for the difference between that value and the price at which they were adjudicated, where the evidence shows that they were sold for their full value, and that the succession sustained no injury thereby.

26. Where an administration instead of being beneficial, has been injurious, to a succession, the administrator will not be allowed commissions.

27. An administrator who renders an account is bound to prove the items of his account by evidence, and may be held to strict proof of them by the parties interested, without a formal opposition on their part. *Succession of Lee*, 579.

III. Of Successions generally.

28. Where, after judgment on an opposition to an executor's account, the account is homologated, and payment ordered to be made accordingly, the opponent cannot, by a rule taken on the executors to show cause why he should not pay over the balance ascertained by the judgment to be due him, and why, on failure to produce his bank book, he should not be condemned to pay

the succession interest at twenty per cent a year on each of the sums belonging to the succession received by him from the dates of their receipt, recover interest at twenty per cent for any period anterior to the date of the judgment of homologation by which he is concluded. *Succession of Mann*, 28.

29. A demand against a surviving husband for an amount due to the succession of his wife, received by the former from sales of the separate property of the wife during marriage, cannot be cumulated with proceedings for the liquidation and partition of the succession. To cumulate such proceedings would be irregular, and tend to embarrass judicial proceedings. The demand must be made by a separate action. *Succession of Serret*, 100.

30. Where a party is placed on the tableau of distribution of the effects of a succession as a creditor for a certain sum, and the tableau is homologated, the homologation of the tableau is a judgment in favor of the creditor, which, so far as the succession is concerned, cannot be prescribed by less than thirty years. *Preslon, Executor, v. Christin et al.*, 102.

31. The curator of a vacant succession cannot claim that the succession be completely administered before surrendering possession to the heirs, nor require security from the heirs for amounts due to the creditors before delivering possession to them; but he may require the previous homologation of his accounts, and the allowance of all credits to which he is entitled for commissions and disbursements in the administration, and the homologation of a statement of the debts due by the succession, where the heirs or legatees are not domiciled in this State and are not citizens of any State in the Union, for the purpose of ascertaining the amount of the tax due to the State under section 4 of the Statute of 26th March, 1842, which amount he is bound to retain from the heirs and pay to the State, under the penalty of his personal responsibility. *Succession of George*, 223.

32. Where it is shown that the succession of a deceased husband would not have defrayed the expenses of its administration, and that he died in a state of absolute destitution, his surviving wife cannot be made responsible for any portion of his debts, under article 2387 C. C., on proof that she took possession of certain old trunks and their contents, which the evidence renders it highly probable contained nothing but papers and old clothes, which she offered to return. *Per Curiam*: If the succession could not have defrayed the expense of its administration, she was not bound to have it administered. *Soubiran v. Rivollet*, 328.

33. Within the limits of the city of New Orleans, the parties interested may elect in which of the district courts they will open a succession; but when opened in one of the courts, it has the same exclusive power over it as the court of probates under the late judicial organization. An action for a debt due by the succession can be brought in no other court. *Clement, Tutrix v. Story et al.*, 371.

34. In a contest between the creditors of an insolvent succession, the notes or obligations of the insolvent are not conclusive proof of the debt of which they are evidence. They must be supported by such additional proof as will satisfy the judge of the fairness and justness of the claims. *Succession of Warren*, 451.

35. The prosecution of a claim for money against a succession is exclusively a probate proceeding. C. P. 924, § 13. *Pargoud v. Breard, Administratrix*, 517.

36. An universal legatee is only liable for his virile share of any debt due by the person whose legatee he is. *Pratt v. Wafer et al.*, 542.

37. Where the legatees named in a testament die before the testator, and there are no debts to pay, the appointment of an executor becomes inoperative. The appointment of an executor is a mandate, which, under our law, is limited to the execution of the legacies contained in the will, and to the payment of the debts, and the powers which it gives are to be strictly construed.

38. The appointment of an executor with the origin of the succession, is not a substantial testamentary disposition, independent of any other.

39. The seizin of an executor is a fiction of law, which does not interfere with the legal possession of the heir.

40. The admission of a will to probate, and the order given for its execution, are mere preliminary proceedings, necessary to the administration of the succession; but they do not amount to a judgment binding on those not parties thereto. *Succession of Dupuy*, 570.

SUMMARY PROCEEDINGS.

See PRACTICE.

SURETY.

See APPEAL. 3.

1. Though a plaintiff is authorized, under article 719 C. P., to issue execution against the surety on a twelve-months' bond, "in

the same manner as on a final judgment," and is thus clothed with one of the rights of a judgment creditor of the surety, he is not really such within the meaning of art. 1989. *Dawson et al., v. Holbert, Tutriz, et al.*, 36.

2. Plaintiff obtained a judgment on one of a series of notes, given to his testator for the price of land and secured by mortgage thereon, and defendant became the surety of the debtor in an appeal bond. The judgment was affirmed on the appeal. Pending this appeal proceedings were had by the holder of another of the series of notes, which had been negotiated by the executor, with his endorsement, and judgment was rendered therein, on his consent, under which the land was adjudicated to the holder of the second note. Plaintiff having subsequently attempted to execute his order of seizure and sale it was enjoined by the purchaser, and the injunction perpetuated. In an action by plaintiff against the surety on the appeal bond: *Held*, that defendant if bound on his appeal bond, would be entitled on paying it to a subrogation to the rights of the creditor; and that the judgment by which the mortgage rights of the plaintiff were extinguished, which rights she contends that the appeal bond was given to secure, having been rendered by her consent the surety is released. *Armor, Executrix v. Amis*, 192.

3. One, not a party to a promissory note, who puts his name on the back, will be bound as a surety.

4. Where two persons, not parties to a promissory note, write their names on its back, being bound as sureties, judgment will be rendered against them, *in solido*, for the whole debt. The obligation of each surety is to pay the whole debt; but this obligation is subject to the right to claim a division. Until this right is exercised, the obligation is *in solido*. C. C 3018, 3019.

5. The exception of division by a surety is a peremptory one, which must be pleaded specially. *McCausland v. Lyons et al.*, 273.

6. Where the principals in a bond are bound *in solido*, a judgment regularly obtained against either will be binding on their surety. *Herrick v. Conant*, 276.

7. A return on a *fi. fa.* that, it was impossible to make a demand upon the defendant personally, and that no property of his could be found, will authorize the plaintiff to proceed against the surety on a bond given to release property which had been sequestered.

8. Where a sheriff inserts in a sequestration bond a condition not required by law, the condition will not be binding on the surety. The bond must be construed with

reference to the law under which it was taken. *Baker et al. v. Morrison et al.*, 372.

9. Where, in a bond executed for the release of property attached, three persons are named as principals, but the bond is signed by but one of the principals and a surety, the latter will not be bound, in the absence of evidence, to destroy the presumption that he expected the three persons named as principals to be bound as such, or to show that he would have any recourse against them, if he paid the amount. *Clements v. Cassilly et al.*, 380.

10. No action can be instituted against the surety on an administrator's bond, until the necessary steps have been taken to enforce payment from the principal. Statute 16th March, 1842, section 6.

11. Where a judgment has been rendered in an action against an administrator, removing him from office and ordering him to render an account, the institution of an action, by the heirs, against him on his bond, for the amount of their inheritance, is not inconsistent with the previous action; but proceedings should be suspended until the administrator has rendered the account ordered in the first action, or until the delay allowed to him for that purpose has expired. The settlement of the account ordered would form the basis of a judgment in the second action. But where, in such a case, the plaintiff proceeds to trial, his action must be dismissed. *Kemper et al. v. Splane, et al.*, 485.

12. Defendants who had, with others, signed a letter, addressed to a judge of probates, stating that those who signed the letter would become the sureties of a third person, in case he should be appointed administrator of a particular succession, cannot be held liable as sureties, though such third person was appointed administrator, where a bond was taken for the discharge of his duties, signed by other persons, and not by the defendants. *Canal and Banking Company v. Grayson et al.*, 511.

13. The failure of any of the persons named as sureties in an administrator's bond to sign it, authorizes those who have signed it to retract, but they must do so seasonably; it is too late, after the obligation of those who signed has been completed by the delivery of the bond, and after the judge, the creditors of the succession, and the administrator, have been permitted to act upon the bond, to oppose the omission of the other signatures.

14. A judgment against the principal in an action on an administrator's bond is not conclusive against the sureties, who were not parties to the action on which the judgment was rendered.

15. By the Civil Code sureties could be joined in the action against their principal, and be subjected to the same judgment; but as relates to sureties on the bonds of administrators, tutors, curators, executors, and appellants, the law has been changed by the Statute of 16th March, 1842, s. 6. *Canal and Banking Company v. Brown*, 545.

TAX.

1. Assessments for paying ordered to be done by an ordinance of a city corporation, made in the exercise of its legal authority, are not taxes, a statute exempting an institution from liability to taxation, being in derogation of common right, must be strictly construed. *City of Lafayette v. Male Orphan Asylum*, 1.

2. In sales for taxes the assessment stands in lieu of the judgment in ordinary judicial sales, and the party relying on a sale of that description is bound to show its existence and legality. *Hughey v. Barrow*, 248.

3. The ordinance of the General Council of the First Municipality of New Orleans, of 28 Nov., 1843, imposing a tax on all retailers of soda-water, with the exception of apothecaries, is not illegal nor unconstitutional; nor will the fact that the party had paid for a license as a confectioner, exempt him from liability for the tax. *First Municipality v. Manuel*, 328.

5. Under section 4 of the statute of 3d May, 1847, the tax on pedlars and hawkers is due from the time when the applicant for a license commences to sell; and, as all taxes are laid for the calendar year, a license for the year 1848, will not authorize the person obtaining it to sell under it in 1849. At whatever period of the year 1848 the licence may have been issued, it will expire with that year. Nor can one who obtains a license at any time after the commencement of the year complain that he pays as much for a license to trade during a portion of the year as others who have paid for the whole year; the inequality is of his own creation, and does not render the statute unconstitutional.

6. The collection of the taxes on pedlars and hawkers for the calendar year, is secured by the bond given in that year by the sheriff, as tax-collector, for the taxes assessed for the preceding year: thus, the taxes on pedlars and hawkers for 1848, which the sheriff receives in the course of that year as the licenses are issued, is secured by the bond given for the general taxes for the year 1847, which are assessed in that year and collected in 1848, the bond providing for the payment of all sums for which the sheriff

may become legally liable during that year. *Buffington v. Dinkgrave*, 548.

7. Sec. 10 of the ordinance of the general council of New Orleans, approved by the mayor on the 16th December, 1846, establishing an uniform rate of taxes, on hawkers, merchants, &c., does not authorize the imposition on each partner in a banking house, or firm, making the purchase and sale of bills of exchange its principal business, of the whole amount of the tax, without regard to his residence in the State. The tax is imposed on the business, and not upon the individual members of the firm, unless they are permanent residents, or sojourners within the State. The authority of the general council to enact that ordinance depends exclusively on the statute of 12 January, 1842; and the power of the State itself to lay taxes only extends to persons and property within its jurisdiction. *Second Municipality v. Corning et al.*, 407.

8. By the statute of 15th March, 1830, section 11, the legal mortgage on real estate in favor of the State for taxes imposed on it, is limited to two years from the time when such tax became due. *Matter of N. O. Improvement and Banking Company*, 471.

9. Under section 37 of the statute of 3 May, 1847, providing a revenue for the support of the government, the compensation allowed to the assessor of taxes mentioned therein, is not limited to a per centage on the amount of the State taxes only. Sec. 7 of the Statute of 16 March, 1848, cannot affect this interpretation of the statute of 1847, as to the compensation of assessors for the year 1847, under the statute of that year. *Vienne v. Police Jury of Natchitoches*, 499.

TESTAMENTS.

See DONATIONS.

TRANSACTION.

See COMPROMISE.

TRESPASS.

See DAMAGES, EX DELICTO.

TUTORSHIP.

See MINORS.

UNITED STATES.

See LANDS.

USUFRUCT.

The fact of a surviving spouse having taken out letters of administration on the estate of the deceased, does not in any manner affect her usufructuary rights under the statute of 25 March, 1844, s. 2. By the terms of the statute the survivor takes the usufruct of so much of the share of the deceased in the community property as may be inherited by the heirs. That share consists of the one half which belonged to the deceased, subject to the debts. With that encumbrance it descends to the heirs, from the instant of the ancestor's death. The right of the survivor to the usufruct attaches at the same moment that the right of property accrues in favor of the heirs. *Per Cur* : The usufructuary is permitted, in such a case, to retain the whole property and receive its fruits, on making the necessary advances to discharge the debts, which are to be reimbursed, without interest, at the termination of the usufruct; or he may sell property to an amount sufficient to discharge the debts, unless the heirs will make the necessary advances; and he

may exercise his right upon the residue. C. C. 578, 579. Nor is the exercise of the right of the usufructuary inconsistent with that of the heirs, or of the creditors, to insist on a speedy adjustment of the debts of the community, and on a sale of property for that purpose, if necessary. *Succession of Bringier*, 389.

USURY.

See INTEREST.

WARRANTY.

See SALE.

WIFE.

See HUSBAND AND WIFE.

WILLS.

See DONATIONS.

WORKMEN.

See LETTING OF LABOR, &c.

A. F. Cochrane v. Robert Murphy; *Hyde & Ogilby v. Steamboat Yazoo*; *Burrows v. Nichols*; *McGinnes v. Mooney*; *Lapeyre, Harrispe & Co. v. Carlos Cruzat & Co.*; *Martin v. Moss, Beard, Calhoun & Co.*; *Kelly and Connyngnam v. Bogart & Foley*; *Reynolds v. White*; *Hardie v. Church of Annunciation*; *Lapeyre, Harrispe & Co. v. C. Cruzat & Co.*; *J. R. Geddes, Garnishee, and R. Reynolds v. Carlos Cruzat & Co.*; *Calhoun v. Butman*; *Glendy Burke v. Louis Berniaud*; *J. M. Del Campo v. J. N. Riculfi*; *Gordon v. Steamboat Fanny*; *W. J. Whiting v. A. W. Walker*; *Mills v. Falvey*; *Evans Rogers v. C. K. Belknap and C. K. Bullard*; *Sosthene Roman, Syndic v. John McDonogh*; *Hiestand v. Wilcox*; *Ratliff v. Back*; *Aimé Guillet v. F. Marquet*; *Chapman v. Bond*; *McGan v. Hatch*; *Gomes v. Placencia*; *Thibodeaux v. Beatty*; *Daniel P. Sparks v. Sherrod B. Sparks*; *S. Bourgeois v. J. F. Jarry*; *H. Decoux v. Bank of Louisiana*; *E. Le Beau, wife of H. Mane v. B. Poydras de Lalande*; *Laborde v. Cain & Hereford*; *D. L. R. Orillon v. Labarre*; *S. H. Wilkinson v. Woodward*; *Thomas W. Johnson v. Bernard*; *Succession of Julia Bara, wife of C. Enete*; *John L. Loddell v. Thomas McLin*; *Eliza Johnson v. Devall and S. M. Clark*; *Eliza Johnson v. T. Maclin*; *Victor, Hebert v. C. Parlange and Wife*; *Elizabeth Blanchard v. Julien Allain*; *Mechanics and Traders' Bank v. B. G. Tenney et al.*; *Joseph W. Tucker v. J. C. Beaty, Attorney for absent Heirs*; *Joseph L. Farmer v. Roberts et al.*; *Chauvin and Lewis v. D'Arensborg*; *Wm. W. Pugh v. W. and J. J. Amonette*; *N. E. Larche v. Collins*; *David Stanbrough v. Price and L. Watson*; *Andrew Murray v. Parish of Tensas*; *Maunsel White v. Slatter*; *Felix Lewis v. R. W. Wynn*; *McClure v. Hoggatt*; *Medley v. Wetzler*; *Wm. G. Griffin v. Lewis Field*; *F. Griffin v. Bank of Louisiana*; *Mary Walker v. George W. Copley*; *Ferguson v. Sweeney*; *Wilford Williams v. William Dennis*; *Oliver B. Cobb v. Bruner et al.*; *Succession of E. L. Whitten et al. v. Annette Johnson*; *Harper v. Moore*; *Michael Smelser v. Williams*; *Carpenter v. Featherstone and Amis*; *Lacoste, use, &c. v. Harper, Executor, et al.*; *Wm. Laughlin v. Templeton*; *Wm. Gyles v. McGill*; *J. L. Trask v. John Henderson*; *Peck & Van Burgen v. Van Veghten*; *Burke & Co. v. Larose*; *State of Louisiana v. Judge of First District Court of New Orleans*; *Noyes v. Pierpont*; *McNamara v. Shute*; *Turner v. Doyle*; *Sparrow v. McGill*; *Cazeneuve v. Plummer*; *Doniphan, for use of, &c., v. Stevens*; *Brown and Laud v. Boylan*; *Jobert et al. v. Pitot*; *J. M. Bach v. Goodrich and Dewees*; *Matter of Merchant's Bank of New Orleans praying & Co.*; *Taylor and Cassidy v. Butnam*; *Robertson v. Kelly*; *Succession of Holmes*; *State of Louisiana v. Hackett*; *Soubiran v. Rivolet*; *Hamilton v. Brady*; *Municipality No. One v. Vogel*; *Howell & Sons v. C. Cruzat & Co.*; *Wilson v. D. Gouans*; *Arbuckle v. Bouny et al.*; *Creevy v. A. W. Walker*; *J. P. Kay v. Crane*; *Dwight, Curator, v. McMillen*; *Parmenter v. Amelia Rhodes, his Wife*; *Claude Rebeard v. James Evans*; *John F. Miller v. Sally Miller*; *Mrs. Antoine Delesparre v. Her Husband*; *Verges v. Bernard et al.*; *Garthwaite Pagan & Co. v. Ship Louisa*; *Rochereau v. Harrison*; *Gaillard v. Citizens Bank of Louisiana*; *Mercier v. J. F. Canonge et al.*; *Rodenburgh and Walls v. Lynch*; *Succession of Lagleise v. Heirs of Chamberlain*; *Rosine, f. w. c., v. Bonabel*; *Robina v. Verret*; *Arnault v. Citizens Bank of Louisiana*; *Town of Carrollton v. Jones and Wife*; *Schockler v. Barret*; *Conand v. Millaudon et al.*; *Dunica and others, Owners of Steamer Maria v. Owners of Sultana*; *Fortier v. Boudar*; *Fellowes, Johnson & Co. v. Dodge et al.*; *Linton v. Stanton*; *P. Boulat v. Municipality No. One and Vidichi*; *Thomas v. Kean*; *Bond v. Jenkins, Curator*; *Fourcade v. Fourcade*; *Hebert v. Leftwitch*; *R. W. and E. S. French et al. v. Hunter*; *Vaught and McLin v. Paxton*; *Harker v. Duncongé*; *Pepper v. Dunlap et al.*; *Augustus, f. m. c., v. Abell et al.*; *Salter and Marcy v. Steamboat Clarks-ville*; *Durant v. Municipality No. Two*; *Gibney v. Fitzsimmons*; *Blick v. Merritt*; *Mary L. Graves v. Elizabeth V. Ludeling*; *W. Reed & Co. v. John Frost*; *Jore v. Jore*; *G. Barnsley & Co. v. Burgess*; *Kohlman v. Ludwig*; *Bouligny v. M. White & Co. and Duvees*; *John Duggan v. Municipality No. Two*; *Fisher, Burgess & Co. v. Wheeler & Ellis*; *Ludwig v. Kohlman*; *Succession of Church*; *B. Gillooly v. Cronan and J. Greely*; *Stacy v. W. C. Hamner*; *Succession of J. M. White*; *Walton, Sanford & Co. v. Rodman, Bacon & Co.*; *Carreras v. His Creditors*.

Not having any lists of the cases decided at other places than New Orleans, and no possibility of getting them in time for this volume, the cases not reported which were decided at those places are not included.

WM. W. K.

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